95-1747

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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN RE DENNIS MICHAEL O'CONNOR, M.D., RICHARD FRIDAY,
Petitioners.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, HONORABLE MARILYN HALL PATEL, JUDGE, *Respondent.*

MAGNO ORTEGA, M.D., *Real Party In Interest.*

Petition from Orders and Judgment of the United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge Presiding

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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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QUESTION PRESENTED

1. Whether the Honorable Patel, District Court Judge, disobeyed the prior mandate of this Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987) by denying petitioners' summary judgment motion; directing a verdict against petitioners on liability; and stripping petitioners of their qualified immunity defense.

2. Whether this Court should exercise its supervisory jurisdiction to issue a writ of mandamus and/or prohibition vacating the respondent district court's orders, and compelling it to enter judgment in petitioners' favor, as was done in the first trial following this Court' remand.

LIST OF PARTIES

Petitioners:	Dennis Michael O'Connor, M.D. and Richard Friday
Respondent:	United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge
Real Party In Interest:	Magno Ortega, M.D.

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PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PRAYER

Petitioners pray for writ of mandate and/or prohibition directed to the respondent United States District Court for the Northern District of California and to the Honorable Judge of said District Court, directing and commanding said Honorable Marilyn Hall Patel, as follows:

1. To vacate its Memorandum and Order of March 11, 1996 denying petitioners' motion for summary judgment, and to enter an order granting petitioners' summary judgment, and

2. To vacate its oral order of March 11, 1996, entering a directed verdict against petitioners and in favor of plaintiff-real party, and

3. To vacate the subsequent special verdicts and the respondent Court's judgment thereupon, and

4. To enter a judgment in favor of petitioners and against real party Ortega.

OPINIONS BELOW

The memorandum and order of the respondent Court denying petitioners' summary judgment, dated March 11, 1996 is included in the Appendix, at pp. A-1 to A-13. Petitioners have included the transcript of Judge Vukasin's ruling of December 4, 1992, entering a directed verdict in favor of petitioners at pp. A-46 to A-54 of the Appendix. The respondent's rulings appear in the transcripts of proceedings for March 6, March 11, and March 13, 1996, attached at pp. A-89 to A-122 of the Appendix. The Judgment, dated April 1, 1996, appears at pp. A-44 to A-45 of the Appendix.

JURISDICTIONAL GROUNDS

The Court has jurisdiction to issue writs of mandamus and prohibition to correct a lower court's disobedience and mistake in executing the Court's mandate, pursuant to 28 U.S.C. § 1651(a), which provides in relevant part that all federal courts are empowered to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the wages and principles of law."

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 42, United States Code Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia."

STATEMENT OF THE CASE

a. Real Party's Claims; Procedural Background.

This petition for extraordinary writ is filed in this Court as the only proper remedy available to petitioners, who prevailed in 1987 in the United States Supreme Court. As set forth more fully below, the respondent district court has failed and refused to execute this Court's mandate as set forth in *O'Connor v. Ortega*, 480 U.S. 709 (1987).

The extraordinary posture of this case is highlighted by the contrary results in the two jury trials that have been held since 1987, when this Court issued its mandate. In 1992, following days of testimony, the district court entered judgment

as a matter of law in favor of petitioners, pursuant to Rule 50 of the Federal Rules of Civil Procedure. However, when the matter was retried in March of 1996, before a different judge, that judge entered judgment as a matter of law against petitioners, even before a jury had been empaneled. The respondent judge made its order sua sponte, real party having made no request, either orally or in writing, before the district court entered its order directing a verdict. At the same time, the respondent judge stripped petitioners of their qualified immunity defense. As a result, the jury entered a verdict against petitioners, awarding compensatory damages of $376,000; and assessing punitive damages against petitioners in the amount of $60,000.[1]

Clearly, one of the two district judges who presided at these trials has failed to obey this Court's mandate. As set forth now fully below, it appears that the respondent district judge has erred, warranting the intervention of this Court. The respondent essentially applied a probable cause standard in evaluating petitioners' liability, the standard which only the minority of the Court in *O'Connor v. Ortega* would have adopted. 480 U.S. at 732-33. Thus, it reached the same conclusion that the minority of the Court embraced in 1987 - that the search at issue herein was unreasonable. Moreover, despite the absence of clearly-established law prior to this Court's opinion, in this case, the respondent divested petitioners of their qualified immunity defense, in defiance of the qualified immunity jurisprudence of this Court.

This 14-year old case arose out of a complaint by real party in interest Ortega that his Fourth Amendment rights were violated under 42 U.S.C. § 1983 by petitioners, hospital administrators of Napa State Hospital who entered his locked, government-owned office without a warrant to conduct an administrative investigation of charges of misconduct. On cross-

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1. Pursuant to State law, Cal. Govt. Code § 825, petitioners have no unqualified right of indemnity from the State to cover the payment of the award of punitive damages.

motions for summary judgment, the District Court granted the petitioners' motion on all grounds raised. The Ninth Circuit Court of Appeals reversed the trial court's decision on the claim of a violation under 42 U.S.C. § 1983, and entered summary judgment against petitioners.

Petitioners Dennis M. O'Connor and Richard Friday were employees of the Napa State Hospital of the State of California. Dr. O'Connor was the Executive Director, Mr. Friday was the hospital administrator; Real Party Dr. Magno J. Ortega, is a licensed physician and psychiatrist who had held the position of Chief of Professional Education at Napa State Hospital from 1964 to September 1981.

On July 30, 1981, Dr. O'Connor informed Dr. Ortega that he planned to investigate the management practices of Dr. Ortega's department. Previously Dr. O'Connor had received complaints against Dr. Ortega. These complaints included charges that 1) medical residents had been coerced into purchasing a computer; 2) Dr. Ortega had entered into improper contracts involving the computer; 3) female residents had been sexually harassed; and 4) a doctor had been improperly placed on involuntary leave by Dr. Ortega.

At the July 30 meeting, Dr. O'Connor stated that he intended to place Dr. Ortega on administrative leave. Dr. Ortega instead requested that he be permitted to take two weeks vacation commencing on Friday, July 31, 1981. Dr. O'Connor confirmed the request in a memo which further directed Dr. Ortega to remain off hospital grounds unless he had Dr. O'Connor's written approval to return. On Friday, August 14, 1981, Dr. O'Connor ordered Dr. Ortega by letter to go on administrative leave with pay because the investigation was incomplete.

Shortly after the July 30, 1981 meeting with Dr. Ortega, Dr. O'Connor selected three hospital personnel to investigate the charges against Dr. Ortega. They included an accountant (Mr. Arnold), a physician (Dr. Laskay), and a hospital peace officer attached to security service (Mr. Stratton). Mr. Friday directed

the investigative team. As part of the investigation he authorized entry into the office to investigate the charges of misconduct (including complaints of sexual harassment reported by residents supervised by Ortega), and to have state property identified and secured, including residents' files. Further justification for the entry was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15th and 16th. Dr. O'Connor was concerned that a theft of state property may have occurred.

Sometime after the weekend the computer was removed, and in the continuing course of the investigation, Dr. Ortega's office door was unlocked, his office entered, and its contents inventoried. Following the search of the office, real party was terminated, and that termination was upheld in appellate proceedings in state court.

As noted above, the Ninth Circuit reversed the trial court's entry of summary judgment in favor of petitioners, in 1985. On certiorari, this Court reversed the Ninth Circuit. In its opinion, this Court held:

> "A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer, together with the allegations of mismanagement of the residency program and sexual harassment, may have made the search reasonable at its inception under the standard we have put forth in this case."

480 U.S. at 728.

This Court further stated:

> "On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope."

Id. at 729.

b. The First Trial in 1992; Judgment Entered in Favor of Petitioners.

On remand, a jury trial commenced in 1992 before the Honorable J. P. Vukasin, United States District Judge. Following days of testimony, the district court entered judgment as a matter of law in favor of petitioners, pursuant to Rule 50 of the Federal Rules of Civil Procedure (See Transcript of 12/4/92, App. at A-49 to A-50, included in the Exhibits to this Petition). Judge Vukasin stated:

> "The Court: Federal Rule of Civil Procedure 50(A)(1) provides, inter alia, if: ". . . . there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the Court may grant a motion for judgment as a matter of law against that party on any claim. . ."
>
> "It appears to the Court that the plaintiff did not establish a legally sufficient evidentiary basis for a reasonable jury to have found. . . to find for the plaintiff on his claim, or claims".

> "As a matter of fact, much to the Court's surprise, it appears that in many regards the plaintiff enhanced the defendants' case, and in fact presented the defendants' case for the defendants on cross-examination of witnesses O'Connor and Friday. Earlier I was wondering if there was sufficient basis for the Court to rule on a motion such as this at this stage absent presentation of testimony by the defendants on their direct case, but it appears that the plaintiff filled in any holes that may have been missing, and provided the evidence necessary for the Court to be able to rule at this time."
>
> "Therefore, the Court finds that defendants' motion for judgment as a matter of law at this stage is justified, that there's no legally sufficient evidentiary basis for a reasonable jury to find in favor of the plaintiff and therefore defendants' motion is granted". (App. at pp. A-49 to A-50).

Judge Vukasin's ruling was nullified, however, on procedural grounds by the Ninth Circuit, a judge of the panel expressing, however, his opinion that the United States Supreme Court had wrongly decided this case.[2/]

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2. The Ninth Circuit's opinion appears at pp. A-123 to A-128 in the Appendix. Given real party's failure to identify, in that appeal, by way of offer of proof, any relevant evidence which the excluded witnesses would have proffered, the ruling by the Ninth Circuit appears to have been a referendum on its feelings about this Court's reversal of it in 1987. None of the witnesses whom real party had claimed were wrongfully excluded in 1992 testified on any substantive point in the 1996 retrial. Petitioners request leave to submit the full transcript of the 1992 trial, which was submitted in

c. Proceedings in 1996; The Second Trial.

On remand from the Ninth Circuit, the case was reassigned for further proceedings to the respondent judge, Judge Vukasin having died in the interim. In November of 1995, petitioners presented, by way of a renewed summary judgment motion (containing the recorded testimony and exhibits from the 1992 trial), the undisputed facts with respect to the petitioners' justification for the search at issue.

The respondent Court initially took the motion under submission, and set the retrial for commencement on March 11, 1996. On the first day of trial, however, the Court issued two contradictory orders which are the subject of this petition, and relief from which petitioners pray herein.

In its written memorandum and order re petitioners' summary judgment motion, on one hand, the respondent judge found an issue of fact to exist as to the reasonableness of the search (App. at pp. A-10 - A-11). However, the same day, following a voir dire hearing, the respondent Court directed a verdict against petitioners on the primary search claim at issue. In disregard of this Court's mandate, the respondent Court ruled as a matter of law that petitioners' reliance upon complaints of sexual harassment was unreasonable as a matter of law, and could not have provided any justification for the searches at issue. In so ruling, the respondent disregarded completely this Court's opinion in this case, in which this Court expressly held that investigation of the complaints of sexual harassment was one of the factors to be considered on remand in determining the reasonableness of the search. 480 U.S. at 728.

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toto in support of petitioners' summary judgment motion in 1996. The petitioners' moving papers appear at App., pp. A-14 to A-43, and accurately summarize the undisputed evidence which should have resulted in summary judgment in favor of petitioners.

The respondent Court's action was particularly egregious, since it had been provided in petitioners' summary judgment papers, exactly the same evidence which had provided the basis for Judge Vukasin's entry of judgment in favor of petitioners. This error of the respondent was magnified by its concurrent ruling that petitioners could not assert the defense of qualified immunity to protect themselves against an award of damages. The respondent judge made the somewhat astounding observation that the prior law regarding the standard for workplace searches was merely repeated by this Court in its opinion in *O'Connor v. Ortega*. (App. at A-86).

Following respondent Court's entry of a partial directed verdict, the jury entered a verdict against petitioners on liability and damages, awarding $376,000 in compensatory damages and $60,000 in punitive damages against petitioners O'Connor and Friday. This verdict was the direct consequence of the respondent Court's failure to apply the law of the case as announced by this Court in *O'Connor v. Ortega*, in which it ruled that all the circumstances, including the complaints of sexual harassment, were to be considered in determining the reasonableness of petitioners' conduct.[3] The fundamental error of the respondent Court's rulings is highlighted by the correct ruling of Judge Vukasin in 1992, who, faithfully applying the law of the case, found as a matter of law, i) that no genuine factual dispute existed as to the reasonableness of the search, and ii) that petitioners' conduct was reasonable under the Fourth Amendment standards announced by this Court in its opinion in this case.

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3. In the 1996 trial, the respondent district judge's sua sponte entry of a directed verdict against petitioners was coupled with an evidentiary ruling - respondent excluding all evidence of the complaints of sexual harassment during the liability phase. During the subsequent damage phase, the district court only allowed petitioners to testify as to their receipt of those complaints, while excluding all corroborating evidence, including Dr. Laskay's investigative report.

REASONS FOR GRANTING THE WRIT

I

THE SUPREME COURT SHOULD GRANT THE WRIT TO CORRECT THE DISOBEDIENCE OF THE RESPONDENT TO THIS COURT'S PRIOR MANDATE

In its prior opinion in this matter, this Court directed that a "reasonableness" standard would govern the lower court's determination, upon remand, of petitioners' workplace search. The Court noted that imposition of a probable cause standard in this case would be unfair and impracticable: "It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." 480 U.S. at 724-25.

Here, after paying lip service to the principles of "reasonableness", the respondent Court evaluated the conduct of petitioners as if they were policemen.[4] Indeed, in ruling that the evidence of complaints of sexual harassment were "too stale" or too generalized to provide a basis for the search, the respondent Court employed standard probable cause verbiage and analysis, while noting (incorrectly) that Dr. O'Connor had "been a law enforcement officer." (Transcript of 3/11/96, App. at p. A-110).

The "staleness" doctrine is applied in the context of the law of criminal procedure, governing the probable cause analysis applied to law enforcement officers in preparing search warrant affidavits and in seeking search warrants. 2 La Fave, Search and

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4. During pretrial proceedings, the respondent Court stated: "What was the exigency to do a warrantless search? If they changed the lock on the door and he was not there, to remove things, why could not they have gotten a warrant?" Transcript of 3/6/96, App. at p. A-78.

Seizure, § 3.7(a), at pp. 338-355 (3rd ed. 1996). Its application by the district court here is consistent only with the *O'Connor v. Ortega* minority's proffered probable cause standard, 480 U.S. at 732-33. The respondent flagrantly disregarded the common-sense, reasonableness approach which this Court dictated was to govern the conduct of petitioners - hospital administrators engaged in a non-criminal, administrative investigation of Dr. Ortega's management of the residency program.

Likewise, the respondent district court's ruling that the complaints of sexual harassment were "too vague" and generalized to provide any valid basis for the search incorporated standard probable cause analysis used in the context of criminal procedure - an approach that cannot be squared with this Court's opinion in this case. The analysis employed by the respondent parroted that employed by the criminal law in the context of gauging search warrant affidavits which are based upon information provided to an affiant peace officer by an informant. 2 La Fave, supra, § 3.3(e), at pp. 154-157.

The touchstone of the Court's rationale in the *O'Connor* opinion was its understanding that imposition of a warrant requirement, and probable cause analysis in the context of workplace searches would be unsuitable, unworkable, and would unduly burden state officials engaged in informal disciplinary investigations. 480 U.S. at 719-721. The unsuitability of the respondent district court's application of the criminal procedure/probable cause analysis here is reflected by the respondent's inaccurate and skewed characterization of the record before it.[5] This was, petitioners submit, a direct result of the

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5. The undisputed evidence before the district court demonstrated not only that the complaints of Ortega's sexual harassment reported to Dr. O'Connor had been ongoing for years, but had continued to the present. (Dr. Pranger Testimony, App. at A-92 to A-95). The complaints were not vague because of any unreliability of the informant, but because the victims had reported Dr. Ortega's misconduct to Dr. Pranger in the context of confidential weekly counseling sessions. (Pranger Test., at A-95).

district court's misapplication of probable cause analysis in a context forbidden to it by this Court's mandate. Petitioners were simply not equipped, by virtue of their training, education or experience, to engage in the complex probable cause analysis improperly imposed by the respondent district court. They should not have been required to, upon penalty of the resulting ruinous damage award. "Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures is simply unreasonable." 480 U.S. at 722.

The respondent Court's disobedience to this Court's mandate was not limited to its misapplication of the standard of liability. As noted above, the respondent court also ruled, after directing a verdict on liability, that petitioners could not assert qualified immunity as a defense to real party's damage claims. Although this Court in its opinion in this case had expressly left open the issue of qualified immunity, 480 U.S. at 729 n. 1, at least one appellate court, following *O'Connor v. Ortega*, ruled that qualified immunity would apply in the circumstances of this case. *Shields v. Burge*, 874 F.2d 1201 (7th Cir. 1989).

The use of probable cause analysis by the respondent judge was particularly startling, since it was exactly the opposite of that employed by Judge Vukasin, four years earlier, after he had heard days of testimony. (Appendix, Transcript of December 4, 1992, at p. A-49 to A-50).

Given the respondent Court's flagrant disobedience to the mandate of this Court, this case presents on exceptional circumstance appropriate for the remedy of mandamus. By this proceeding, petitioners seek to exercise what this Court has ruled is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning." *United States v. Fossatt*, 20 How. 445, 446 (1858).

The relief sought by this petition is not available by other means, and there is no adequate remedy, in any other

court than this Court. *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978).

> "A litigant who, like [petitioners] has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through the entire process again to obtain execution of the judgment of this Court."

Id. at 497.

The observation by the Court in *Felter* is especially apt in the circumstances of this case, given the apparent willingness of the Ninth Circuit to reverse Judge Vukasin, who demonstrated his fidelity to the precedent laid down by this Court. If allowed to stand unremedied by the immediate correction of this Court, the concept of "reasonableness" as the touchstone of workplace searches will be effectively drained of its meaning.

Moreover, the well-publicized result in this case (with a $376,000 compensatory damage award and $60,000 punitive damage award) will doubtless chill employers and supervisors in their investigation of workplace misconduct, especially given the district court's stripping away of the qualified immunity defense.

II

THE UNPRECEDENTED REJECTION OF THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE BY RESPONDENT WARRANTS THE EXTRAORDINARY INTERVENTION OF THIS COURT

Even were the respondent court correct in its unsolicited and sua sponte ruling on liability, it would be difficult to imagine a clearer case for the application of qualified immunity. Until this Court announced its opinion in 1987 in this case, it can hardly be said that the law governing workplace office searches

was "clearly established" within the meaning of qualified immunity jurisprudence. The keystone of this Court's opinions in the law of qualified immunity is the principle that if the case law, in factual terms, has not staked out a bright line, that qualified immunity will protect the state official. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v.Fitzgerald*, 457 U.S. 800 (1982). This principle is precisely what the respondent judge rejected when she expounded the basis for her ruling.[6] Should this Court allow this ruling by respondent to stand, the salutary underpinnings of the immunity will be seriously undermined. Its purpose is, after all, to protect public officials "from undue interference with their duties and from potentially disabling threats of liability". *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

The respondent's error on the point of qualified immunity is especially mystifying, given this Court's admonishment in 1991 to the judges of the Ninth Circuit, in particular. In *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), the Court reemphasized: "[A] court [considering a claim of qualified immunity] should ask whether the [state official] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed five years after the fact." Or, in the instant case, fifteen years after the fact.[7]

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6. The respondent court stated:

> "I don't see that they [the Supreme Court] really stake out any new law". (App. at p. A-86).

7. Especially telling, perhaps, is the respondent's error in ignoring the element of legal advice being sought by petitioners from departmental counsel prior to initiating the search of real party's office. In some circuits, at least, this has been considered of some relevance in evaluating claims of qualified immunity. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991); *Slone v. Herman*, 983 F.2d 107 (8th Cir. 1993). Even a panel of the Ninth Circuit has so ruled. *Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990).

The respondent court's disobedience to this Court's qualified immunity jurisprudence may also simply reflect the developing trend in the opinions of the Ninth Circuit rejecting any separate qualified immunity inquiry in Fourth Amendment cases, especially involving claims of police excessive force. *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 (9th Cir. 1992). This trend is inimical to the important public policies underlying the qualified immunity defense, as well as being fundamentally unfair. State hospital administrators, whose primary obligation is to provide care to their patients, should not be expected to engage in the kind of probable cause analysis and legal scholarship normally associated with law professors, academicians, and trained law enforcement officers.

CONCLUSION

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a majority of this Court promulgated a workable "reasonableness" standard. It is unconscionable that the same petitioners, who brought the case to the court, have now been mulcted in punitive damages because of the respondent court's studied refusal to apply the law of the case as announced by this Court. A more extreme exemplar of judicial defiance can hardly be imagined, and only that conduct of respondent justifies the extraordinary relief sought in this petition.

Wherefore, petitioners pray that this Court issue the writs of mandamus and/or prohibition specified above, as this Court may deem appropriate, directed to the Honorable Patel, District Judge.

Petitioners further pray that this Court grant petitioners such other and further relief as it may deem to be just and equitable.

Dated: April 23, 1996.

Respectfully submitted,

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MAGNO ORTEGA, M.D., *Real Party In Interest.*

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APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO ORTEGA, M.D., Plaintiff, v. D. O'CONNOR, et al., Defendants.	**[Filed March 11, 1996]** **DC No. C-82-4045 MHP** **MEMORANDUM AND ORDER**

Plaintiff Dr. Magno Ortega brought this action against Dr. Dennis O'Connor, Executive Director of the Napa State Hospital ("Hospital"), and various other Hospital officials under 42 U.S.C. § 1983, alleging that a search of his office violated the Fourth Amendment. On cross-motions for summary judgment the district court granted judgment for defendants, and plaintiff appealed. The Ninth Circuit Court of Appeals reversed, granting partial summary judgment for plaintiff, and remanded the case to the district court for a determination of damages. Defendants appealed. The United States Supreme Court reversed, articulating a "reasonableness under all the circumstances" standard for intrusions on the privacy interests of government employees, and remanded. On remand, the district court directed a verdict for defendants, and plaintiff appealed. The Ninth Circuit

affirmed in part, reversed in part and remanded. Now before the court is defendants' motion for summary judgment, defendants' motion to dismiss two of the defendants, and both plaintiff's and defendants' requests for judicial notice.

Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

Dr. Magno Ortega, a physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital for 17 years until his dismissal in 1981. As Chief of Professional Education, Dr. Ortega was responsible for the training of young physicians in psychiatric residency programs.

In July 1981, Dr. Ortega became the subject of an investigation into the management practices of his department. The Hospital officials attest they were concerned with Dr. Ortega's acquisition of an Apple II computer for use in the residency program. The Hospital officials contend that Dr. Ortega may have misled Dr. O'Connor, the Executive Director of the Hospital, into believing that the computer had been donated, when in fact the computer had been financed by possibly coerced contributions from the psychiatric residents. Additionally, the Hospital officials state they were concerned with charges that Dr. Ortega took inappropriate disciplinary action against a resident.

On July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation of these two allegations. At Dr. Ortega's request, Dr. O'Connor agreed to allow Dr. Ortega to take two weeks' vacation instead of administrative leave and requested that Dr. Ortega stay off the

Hospital grounds during the course of the investigation. On August 14, 1981, Dr. O'Connor informed Dr. Ortega that the investigation had not yet completed, and that he was being placed on paid administrative leave. Dr. Ortega remained on administrative leave until the Hospital terminated his employment on September 22, 1981.

Dr. O'Connor selected several Hospital personnel to conduct the investigation, including an accountant, a physician and a Hospital security officer. Richard Friday, the Hospital Administrator, led the investigation. According to defendants, although the investigation was initially directed to two issues--Dr. Ortega's acquisition of the computer and his disciplinary action against a resident--during the course of the investigation the investigative team began to receive complaints of sexual harassment from female residents supervised by Dr. Ortega. As a result, Dr. O'Connor authorized the team "to extend[] the investigation to other areas as the investigation revealed other possible problem areas, including that of sexual harassment of female psychiatric residents." Defendants Exh. I at 1.

At some point during the investigation Mr. Friday made the decision to enter Dr. Ortega's office. The resulting search was extensive: the investigators entered the office a number of times and seized several items from Dr. Ortega's desk and file cabinets, including a Valentine's Day card, a photograph and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding before the California State Personnel Board to impeach the credibility of the former resident who testified on Dr. Ortega's behalf. The investigators also seized billing documents of one of Dr. Ortega's private Medicaid patients. Apart from seizing these

items, the investigators did not separate Dr. Ortega's property from state property, and no formal inventory of the office was ever made. Instead, all of the papers in Dr. Ortega's office were placed in boxes and put in storage for him to retrieve.

The Hospital officials maintain that the search was conducted to secure state property and was initially directed to two issues: Dr. Ortega's allegedly improper purchase of the computer from the coerced contributions of residents, and his alleged punishment one of the residents who refused to contribute to the purchase of the computer. Additionally, the Hospital officials allege that Dr. Ortega, despite having been ordered to stay off hospital grounds during the investigation, returned to the hospital during that time and removed the computer. According to defendants, the removal of the computer was of significant concern to the Hospital administration and was a major factor leading to the search of Dr. Ortega's office.

Initially, defendants contended that the search was conducted pursuant to a Hospital policy of taking a routine inventory of state property in the office of a terminated employee. At the time of the search, however, the Hospital had not yet terminated Dr. Ortega, who was still on administrative leave. Apparently, there was no policy of taking an inventory of the offices of those on administrative leave.

In response, Dr. Ortega contends that the purpose of the search was to secure evidence for use against him in administrative disciplinary proceedings. He points to the fact that no inventory was ever taken of the property in his office, and that seized evidence was eventually used in the administrative proceedings. Dr. Ortega further contends that the computer was not removed from the hospital at the time of the inception of the search. Rather, Dr. Ortega claims that the

computer was not removed until August 15, 1981, two weeks after the search, when he returned from "vacation" and found the locks on his office changed. Dr. Ortega submits that at that time he removed the computer from an unlocked room separate from his office, and told his secretary that he was taking it. Lastly, Dr. Ortega contends that allegations of sexual harassment did not in fact arise until well after the inception of the search and seizure of his office and property, and that therefore such allegations cannot be used by defendants to justify their actions.

Dr. Ortega initiated this action in 1982 against Dr. O'Connor and other Hospital officials under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment the district court granted defendants' motion. Relying on *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F.Supp. 207 (S.D.N.Y. 1979), Judge Vukasin concluded that the search was proper because there was a need to secure state property in the office. The Ninth Circuit affirmed in part and reversed in part, holding that Dr. Ortega had a reasonable expectation of privacy in his office, and that the search violated the Fourth Amendment. *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985). The Ninth Circuit then granted Dr. Ortega partial summary judgment on the issue of liability for an unlawful search, and it remanded the case to the district court for a determination of damages. Defendants appealed the Ninth Circuit ruling to the Supreme Court, which reversed and remanded the case to "determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope." *O'Connor v. Ortega*, 480 U.S. 709, 729 (1987). On remand Judge Vukasin granted defendants'

motion for a directed verdict and Dr. Ortega appealed. *Ortega v. O'Connor*, 1993 WL 87804 (N.D. Cal. 1993). The Ninth Circuit affirmed in part, reversed in part and remanded finding that it was error for the district court to exclude Dr. Ortega's witnesses as a sanction for Dr. Ortega's alleged failure to comply with a pretrial order, and that such error was not harmless. *Ortega v. O'Connor*, 50 F.3d 778 (9th Cir. 1995). This action was assigned to this court on May 22, 1995.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W.Elec. Serv. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present significant probative evidence supporting the claim); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

The court's function, however, is not to make credibility determinations, *Anderson*, 477 U.S. at 249, and the inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

I. Defendants' Motion for Summary Judgment

A. Reasonableness of the Search

The applicable legal standard governing the reasonableness of the search of Dr. Ortega's office was announced by the Supreme Court in its opinion in this case. Justice O'Connor, writing for a four member plurality, announced the judgment of the Court:

> We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. . . . Ordinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonableness grounds for suspecting that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. . . The search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'

O'Connor v. Ortega, 480 U.S. at 725-26 (quoting *New Jersey v. T.L.O.*, 460 U.S. 325, 341-42 (1985).).

In light of its newly articulated standard, the Court remanded the case to the district court to "determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope." *O'Connor*, 480 U.S. at 729. The Court concluded that because of the procedural posture of the case, it would not attempt to determine whether the search of Dr. Ortega's office and the seizure of his personal belongings was reasonable in both its inception and scope. *Id.* at 726. The Court noted that no evidentiary hearing had been held in the case as both the district court and the Ninth Circuit had acted on motions for summary judgment. *Id.* The Supreme Court found that both of the lower courts were in error because summary judgment was inappropriate. *Id.* at 727. According to the Court, because the parties disagreed about the justification of the search, "the record was inadequate for a determination on motion for summary judgment of the reasonableness of the search and seizure." *Id.*

Defendants have continuously maintained that the search and seizure were justified in order to secure state property in Dr. Ortega's office. They contend that the search of Dr. Ortega's office was conducted for valid investigatory purposes directly related to the charges of misconduct against him. The Hospital officials allege that the inception of the search was justified because of their concern over Dr. Ortega's acquisition of the computer, his inappropriate disciplinary action against a resident, and the charges of sexual harassment.

Dr. Ortega, on the other hand, has consistently rejected defendants' characterization of the search. Dr. Ortega contends that the intrusion was not motivated by a need to secure state property, but rather, was an attempt to discover evidence that could

be used against him in administrative proceedings. Moreover, Dr. Ortega contends that the Hospital officials could not have used his removal of the computer as a basis to justify the search, because at the inception of the search he had not yet removed the computer from the hospital premises. Similarly, Dr. Ortega submits that the allegations of sexual harassment did not arise until after the inception of the search, thereby challenging defendants' reliance on such allegations to justify the search.

Based on these conflicting factual allegations, the Supreme Court concluded that there was a factual dispute about the character of the search. *O'Connor*, 480 U.S. at 728-29. Consequently, the Court refrained from ruling ont he reasonableness of the search and remanded the case for further proceedings. *Id.*

On remand, the district court granted defendants' motion for a directed verdict at the close of Dr. Ortega's case in chief. *Ortega v. O'Connor*, 1993 WL 87804 (N.D. Cal. 1993). On appeal, Dr. Ortega claimed that Judge Vukasin improperly barred testimony of his witnesses as a sanction for allegedly failing to serve a witness list on opposing counsel. *Ortega v. O'Connor*, 50 F.3d 778, 780 (9th Cir. 1995). The Ninth Circuit agreed and remanded, finding that Dr. Ortega sufficiently complied with the local rules and that the court's sanction was in error.

This action is once again before the district court on remand, and defendants have once again moved for summary judgment. In accordance with the Supreme court's opinion in this case, this court finds that summary judgment on the reasonableness of the search is inappropriate at this time.

B. Reasonableness of the Seizure

In its opinion in this case, the Supreme Court deferred decision on the standard to be applied to the seizure of Dr. Ortega's personal items from his office. The Court stated: "We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items." *O'Connor,* 480 U.S. at 729 n..

Subsequent to the Supreme Court's opinion, the Ninth Circuit held that the seizure of a government employee's belongings would be reasonable only if relevant to the individual's employment. *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, (9th Cir. 1987), appeal after remand sub nom., *Schowengerdt v. United States*, 944 F.2d. 483 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992). In *Schowengerdt,* the court stated that "the scope of the inquiry must be no broader than necessary. If less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes. . . the search would be unreasonable . . ." Id. at 1336 (citations omitted).

Defendants contend that the items taken from Dr. Ortega, including a Medi-Cal billing form, checks from residents and correspondence relating to the purchase of the computer, were clearly relevant to Dr. Ortega's employment and the charges being investigated. With respect to the photograph of the female resident and notes from her, the Hospital officials allege that these items were relevant to prove a pattern of sexual harassment by Dr. Ortega.

In response, Dr. Ortega argues that although Hospital officials may have a legitimate interest in preventing sexual harassment, it was unnecessary for

defendants to seize personal belongings from his office in order to prove such matters. Moreover, Dr. Ortega contends that less intrusive methods were feasible and the extent of the seizures exceeded that necessary for defendants' purposes. Dr. Ortega challenges defendants' contention that the seizure of the photograph, Valentine's Day card and book of poems were relevant to prove a pattern of sexual harassment; he argues that "it is the height of illogic" to claim that evidence of a consensual relationship proves a pattern of sexual harassment.

Although the reasonableness standards applicable to the search of Dr. Ortega's office and the seizure of his personal belongings are slightly different, the relevant facts are the same. As already explained, such facts are disputed by the parties. Therefore, this court finds that summary judgment on the reasonableness of the seizure of Dr. Ortega's personal belongings is similarly inappropriate.

II. Defendants' Motion to Dismiss Two Defendants

Defendants maintain that two of the defendants, Dr. Stephen Donoviel, former Clinical Director at the Hospital, and Dorothy Owen, former personnel officer, were not involved in the searches and seizures at issue, and therefore that judgment in their favor is warranted. Plaintiff responds that defendants Donoviel and Owen should not be dismissed because both Donoviel and Owen testified in their depositions that they regularly attended meetings with other defendants at which administrative matters, such as the search of Dr. Ortega's office, were discussed and decided.

Based on this dispute over the involvement of these defendants, this court denies defendants' motion to dismiss defendants Donoviel and Owen.

III. Requests for Judicial Notice

A. Plaintiff's Requests for Judicial Notice

Plaintiff requests that the court take judicial notice of the fact that none of defendants' answers to interrogatories mentions allegations of plaintiff's sexual harassment as grounds to support defendants' actions herein. Plaintiff Exh. C.

Additionally, plaintiff requests that the court take judicial notice of the fact that defendants did not mention the issue of sexual harassment in either the statement of facts or arguments presented in defendants' Motion for Summary Judgment filed on February 14, 1984. Plaintiff Exh. D.

Lastly, plaintiff requests that the court take judicial notice of the fact that defendants did not mention allegations of sexual harassment against plaintiff as grounds for entering his office and seizing his personal property in either the statement of facts or in any legal arguments presented in Appellees' Answering Brief filed by defendants on January 8, 1985 with the Ninth Circuit. Plaintiff Exh. E.

All three of plaintiff's requests for judicial notice are hereby granted.

B. Defendants' Requests for Judicial Notice

Defendants' request that the court take judicial notice of the decision of the Court of Appeal of the State of California, in *Ortega v. State Personnel Board*, Case No. A039656, and the Memorandum of Decision of the Napa Superior Court in *Ortega v. State Personnel Board*, Case No. 44526. Defendants Exhs. A & B.

Defendants' requests for judicial notice are hereby granted.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) defendants' motion for summary judgment is DENIED;

(2) defendants' motion to dismiss defendants Donoviel and Owen is DENIED;

(3) plaintiff's requests for judicial notice are GRANTED;

(4) defendants' requests for judicial notice are GRANTED.

IT IS SO ORDERED.

Dated: March 11, 1996

MARILYN HALL PATEL
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO ORTEGA, M.D., et al.,	**[Filed January 11, 1996]**
Plaintiffs,	**No. C-82-4045-MHP**
vs.	
DENNIS M. O'CONNOR, et al.,	
Defendants.	

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: Friday, February 16, 1996
TIME: 10:30 a.m.
CTRM: 11, 19th Flr.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO ORTEGA, M.D., et al., Plaintiffs, vs. DENNIS M. O'CONNOR, et al., Defendants.	**No. C-82-4045-MHP** **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **DATE: Friday, February 16, 1996** **TIME: 10:30 a.m.** **CTRM: 11, 19th Flr.**

TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that at the date, time and place designated above, before the Honorable Marilyn Hall Patel, United States District Judge,

defendants above-named will move the court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based upon the moving papers, the trial transcript and exhibits filed herewith, and all of the pleadings and papers on file herein.

DATED: January 10, 1996.

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MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

a. Nature Of This Action; Claims And Procedural History.

This is an action for damages brought by plaintiff, Dr. Magno Ortega, against the officials at Napa State Hospital who participated in the disciplinary proceedings which resulted in plaintiff's dismissal from State service, in 1981. Plaintiff, who was in charge of the Department of Professional Education at the Hospital, was found by the State Personnel Board to have committed the following acts of misconduct justifying termination:

1) Sexual harassment of female employees whom plaintiff supervised (State Personnel Board Proposed Decision, Ex. "M", at pp. 3-4);

2) Coercing medical residents whom plaintiff supervised into contributing to the purchase of a computer (which plaintiff eventually took home) (Id., Ex. "M" at pp. 4-5);

3) Illegally placing a resident (Dr. Vaughn) on unpaid leave, apparently because the resident had refused to contribute to the computer fund. (Id. Ex. "M", at pp. 5-6);

4) Violating state rules and regulations regarding a service contract regarding the computer, after lying to the Hospital's Executive Director, defendant Dr. Mike O'Connor, M.D., about it. (Id., Ex. "M" at pp 6-7).[1]

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1. The charges giving rise to the discipline are contained in the "Notice of Punitive Action," sent to Dr.

The hearing officer's decision was adopted by the State Personnel Board (Ex. "L"), and was affirmed on mandate by the California Court of Appeal (Decision Memorandum, filed Nov. 22, 1988). The Court of Appeal, in affirming the action of the State Personnel Board in terminating plaintiff, noted that the testimony of the employees he harassed was "uncontroverted" by Dr. Ortega. (Id. at p. 5).

Plaintiff claims, however, that Dr. O'Connor violated his constitutional rights by authorizing the search of his office at the Hospital during the course of the investigation; and the seizure of documents from the office relative to the investigation, including a valentine, poem and a photograph from a female resident (Dr. Sutton), whom plaintiff had formerly supervised (the items are Exs. "MM", "NN" and "OO") (1st Amend. Cmplt., dated 1/27/83, at pp. 4-5, ¶¶ 8, 9).

Plaintiff initially sought $250,000 "or more" damages for the use of the allegedly-wrongfully seized evidence against him in the personnel proceeding, and for emotional distress due to the loss of professional reputation as a result of the termination (Id. p. 11, ¶ 25). However, following defendants' motion, this Court granted partial summary judgment, holding that "according to the doctrine of collateral estoppel, plaintiff is precluded from claiming, as an element of damages, that his dismissal resulted from the allegedly

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Ortega by defendant Dr. O'Connor, on September 14, 1981 (Ex. "J"). Dr. O'Connor stated therein that Ortega's conduct, including repeated rubbing up against female employees, and handling their buttocks were, among the other charges, "not consistent with the standards expected of a Chief of Professional Education". (Ex. "J", at p. 7, as amended by Ex. "K", dated 10/26/81).

unlawful search of his office." Plaintiff's Fourth Amendment unlawful search claim is the only federal claim remaining. (Order, filed July 28, 1988, at p. 10). Defendants' res judicata and qualified immunity motions were, however, denied.[2]

b. Governing Law; Basis For This Motion.

As the Court is no doubt aware, prior appellate proceedings herein resulted in a landmark decision by the Supreme Court, *O'Connor v. Ortega*, 480 U.S. 709 (1987), concerning the Fourth Amendment rights of public employees. As the Court aptly noted at the status conference held in November of 1995, the mandate of the Supreme Court on remand is as follows:

> "On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope."

480 U. S. at 729 (emphasis added). The Court also noted that the record before on summary judgment was incomplete, as "no evidentiary hearing had been held" by the district court. Id. at 726. Apparently, this Court is to hold such a hearing on remand.

Hereto, defendants overlooked this explicit direction of the Supreme Court allowing the prior trial

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2. A review of the record shows that this is the defendants' first motion addressing the substantive merits of plaintiff's Fourth Amendment claims.

to proceed before a jury.[3] However, as set forth more fully hereinafter, it is clear that no dispute exists as to any material fact, and defendants are therefore entitled to judgment as a matter of law.

ARGUMENT

I

THE SEARCHES AT ISSUE WERE REASONABLE AND LAWFUL UNDER THE UNDISPUTED FACTS

As discussed by the Supreme Court in this case, in announcing the applicable legal standard:

> "It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard. As Justice Blackmun observed in T. L. O., '[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause.' Id., at 353, 83 L Ed 2d 720, 10 S Ct 733. We believe that this observation is an equally apt description of the public employer and supervisors at the Hospital, and we conclude that a reasonableness standard will permit regulation of the employer's

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3. The trial transcript is submitted in support of defendants' summary judgment, and testimony therein will be designated "Tr. Trans., at ____".

conduct "according to the dictates of reason and common sense."

. . . . . .

"In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable," 469 U.S. at 351, 83 L Ed 2d 720, 105 S Ct 733 (Blackmun, J., concurring in judgment), for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry v. Ohio*, 392 U.S. at 20 (20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383); second, one must determine whether the

> search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' ibid." *New Jersey v. T. L. O., supra*, at 341, 83 L Ed. 2d 720, 105 S Ct 733.
>
> "Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Because petitioners had an "individualized suspicion" of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today. See *New Jersey v. T. L. O., supra*, at 342, n 8, 83 L Ed 2d 720, 105 S Ct. 733. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 469 U S at 342, 83 L Ed 2d 720, 105 S Ct 733.

480 U.S. at 724-726.

Furthermore, the Supreme Court suggested that the following showing would meet the standards in the instant case:

> "A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr.

> Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer-together with the allegations of mismanagement of the residency program and sexual harassment may have made the search reasonable at its inception under the standard we have put forth in this case."

80 U. S. at 728.

As now summarized, the evidence clearly shows that the searches of Dr. Ortega's office were valid under these criteria.

i) **The Investigation In July-August Of 1981; Reasons For The Search.**

Dr. Ortega, a state-licensed physician and psychiatrist, was hired by the State of California to occupy the position of Chief of Professional Education at Napa State Hospital ("NSH"), a mental hospital operated by the State. In July of 1981, Hospital officials, including the Executive Director, defendant Dr. Mike O'Connor, M.D., became aware of possible improprieties in Dr. Ortega's management of the residency program; i.e., the physician-psychiatrists performing residencies at Napa State Hospital.[4/]

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4. As head of the Department of Professional Education, plaintiff was responsible for managing the

On July 30, 1981, Dr. O'Connor initiated the investigation of plaintiff's management of the Department at the Hospital. (O'Connor Testimony, Tr. Trans., at pp. 2-185 to 2-186; Ex. "C", "Management Investigation"). Defendant Richard Friday, the Hospital Administrator, was placed in charge of the investigation (Ex. "C", O'Connor to Friday, 7/29/81). Initially, the investigation was directed to two issues concerning Ortega's improperly purchasing a computer by coercion of residents; and his illegal punishing of one of the residents who refused to contribute (Dr. Vaughn) by placing him on leave. (O'Connor Testimony, Tr. Trans. at 2-172, 2-183 to 2-184; Ex. "A", Letter of Owen to O'Connor, 7/29/81). There was also an issue involving Ortega's honesty in reporting the circumstances of the acquisition to Dr. O'Connor (Id.).

Richard Friday, after receiving his mandate, appointed an investigative team to actually perform the investigation, Dr. Tom Laskay, a doctor at Napa State Hospital; Tom Arnold, an accountant on the staff; and James Stratton, an investigator at the Hospital.[5/] (O'Connor Testimony, Tr. Trans. at 2-193 to 2-194;

Psychiatric Residency Program, as well as a liaison with the Executive Director for education of the medical staff. (O'Connor Testimony, Tr. Trans. at 2-165 to 2-166). Ortega, as a Department head, reported directly to Dr. O'Connor, the Executive Director of Napa State Hospital.

5. Dr. Laskay is deceased. At the time he was in charge of the Office of Professional Responsibility at NSH, which had responsibility for ethical oversight of the medical staff at the hospital.

Exs. "D", "E", "F"). The team was to report on a daily basis to Dr. O'Connor (Ex. "D").

Although the investigation was to have been completed by August 14, 1981, (Ex. "H" O'Connor to Ortega, 8/14/81)), it had not been completed by that date because the investigative team, during their interview of the residents on the computer, began to receive complaints of sexual harassment from female residents Ortega supervised. (O'Connor Testimony, Tr. Trans. at 2-201 to 2-204; Ex. "I", 8/27/81, "Preliminary Rept. of Investigative Team"). When notified, Dr. O'Connor authorized the investigative team to "extend . . . the investigation to other areas [beyond the computer] as the investigation revealed other possible problem areas, including that of sexual harassment of female psychiatric residents." (Ex. "I", at p. 1).

Consequently, on August 14, 1981, Dr. Ortega was notified (Ex. "H") that the investigation had not completed, and that his leave was being extended for 2 weeks. (Ex. "H"). Ortega was ordered to meet with the "Review Team" to have an interview. (Id.) However, despite having been ordered to stay off hospital grounds, Ortega returned to the hospital and took away the computer he had told O'Connor had been donated to the hospital. (Ex. "KK" O'Connor to Manshouri 4/13/81, "Thank you for . . . donation. . ."; Ex. "BBB", Missing Property Report).

On August 28, 1981, the investigative team submitted their report to Dr. O'Connor. (Ex. "I"). In addition to the charges of sexual harassment,[6] the

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6. The report notes that the team reviewed the contents of Ortega's office on the hospital for evidence of his improper relations with female residents or staff. (Ex. "I" at p. 5). The investigators also reviewed the

report details additional evidence of Dr. Ortega's mismanagement of the Professional Education Department, including failing to maintain any appraisals or other records concerning the residents Ortega was supposed to be supervising, and seeing private Medi-Cal patients at his State office. (Id., pp. 6-7).

Following the conclusion of the investigation, Dr. O'Connor, based upon the investigative team's report, telephoned Ortega and told him he was terminated. (O'Connor Testimony, Tr. Trans. at 2-213 to 2-215). A follow-up notice of charges was sent to Dr. Ortega. (Ex. "J" & "K"). As noted above, the charges were all sustained, and the valentine, photo and poem were admitted into evidence at the personnel board proceeding. (See "Order Denying Defts' Mtn. to Dismiss", July 28, 1989, at p. 3).

Thus, the undisputed evidence shows that the search of Dr. Ortega's office was for valid investigatory purposes related to the charges of misconduct which were the subject of the investigation. This result was foreseen by the Supreme Court:

> "The removal of the computer - - together with the allegations of mismanagement of the residency program and sexual harassment - - may have made the search reasonable at its inception under the standard we have put forth in this case."

480 U.S. at 728.

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contents and ascertained that, despite being in charge of the residency program, no performance appraisal records of residents were maintained in the office. (Id.)

ii. <u>The Scope Of The Search Was Reasonable, And Only Items Relevant To The Charges Being Investigated Were Retained.</u>

In the *O'Connor v. Ortega* decision, the Supreme Court deferred decision on the standard to be applied to the "seizure" of items from the Office of Professional Education at NSH, occupied by Dr. Ortega as head of the Department.

> "We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items."

480 U. S. at 728 n.

Subsequent to *O'Connor v. Ortega*, the Ninth Circuit has held that such a seizure is "reasonable" if the items seized are relevant to the job investigation being pursued. *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1836 (9th Cir. 1987).

Clearly, this criteria was met in the instant case. The items taken from Dr. Ortega's desk included a Medi-Cal billing form, and checks from residents, and correspondence relating to the purchase of the computer. (Exs. "U" - "X"). These items were clearly relevant to the charges being investigated. (O'Connor Testimony, Tr. Trans. at 2-212 to 2-213; Ex. "I", Investigation Report, at pp. 2-6; 7). Plaintiff apparently does not dispute the relevance of these items, or their seizure.

However, with respect to the photo of the female resident, Dr. Sutton, and the notes to Dr. Ortega from her (Exs. "MM", "NN", "OO"), plaintiff claims that

these items were "personal", and not the proper subject of seizure.[7] He is mistaken. As Dr. O'Connor explained in his testimony, these items were relevant to prove a pattern of sexual harassment by plaintiff of female residents he supervised. (O'Connor Testimony, Tr. Trans., 1-110 to 1-112).

> "We were concerned that [the valentine, etc. were sent] during a time where [Ortega was Dr. Sutton's] superviser [sic]. That was the issue.
>
> . . . . . .
>
> We were concerned that as an overall picture, that [Ortega] may have exerted . . . influence either by harassment, or whether it was by consensual interactions; that was inappropriate either way."

(Id. at 1-112). These items, moreover, were also admitted at the State Personnel Board hearing. (Id. at 1-106).

iii. Dr. Donoviel And Mrs. Owen Were Not Involved In The Search At Issue, And They Should Be Dismissed.

Dr. Donoviel and Mrs. Owen, the clinical director and personnel officer at the Hospital, were not involved in the searches or seizures at issue. Consequently, judgment in their favor is warranted.

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7. The Supreme Court acknowledged that plaintiff has a reasonable expectation of privacy in these items, 480 U.S. at 719. However, that does not, contrary to plaintiff's apparent belief, terminate the privacy inquiry mandated by the Court. Id.

CONCLUSION

Given the foregoing discussion, the lack of merit to plaintiff's Fourth Amendment claims is palpable. The question remains, however, as to plaintiff's motivation for pursuing this litigation (generally in pro per status), for the past 15 years.

Defendants suggest that perhaps, simple retaliation is predominant here, as evidenced by plaintiff's absurd explanation, at the prior trial, of the reasons why he had never returned the computer to Napa State Hospital. (Ortega Testimony, Tr. Trans., at 362-364).

Whatever the reasons, the Fourth Amendment claims are meritless, and summary judgment in favor defendants is warranted.

DATED: January 10, 1996.

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Attorney General

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO ORTEGA, M.D.,	**[Filed February 1, 1996]**
Plaintiff,	**No. C-82-4045-MHP**
vs.	**DEFENDANTS' REPLY MEMORANDUM TO PLAINTI OPPOSITION TO MOTION FO**
DENNIS M. O'CONNOR, et al.,	**SUMMARY JUDGMENT**
Defendants.	**DATE: February 16, 1996** **TIME: 10:30 a.m.** **CTRM: 11, 19th Flr.**

COME NOW defendants D. Michael O'Connor, M.D., Richard Friday, Dr. Stephen Donoviel, Ph.D., Dorothy Owen and submit the following reply to

plaintiff's opposition to their motion for summary judgment.

DATED: February 1, 1996.

DANIEL E. LUNGREN
Attorney General

PAUL T. HAMMERNESS
Deputy Attorney General

Attorneys for Defendants D. Michael O'Connor, M.D., Richard Friday, Dr. Stephen Donoviel, Ph.D., Dorothy Owen

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff's opposition papers unfortunately, resort to the twisting of the record in order to attempt to raise a triable issue of material fact sufficient to avoid summary judgment. Plaintiff's efforts, however, are unavailing and are reflected by the absence of any substantive citation to, or discussion of, the facts now before the court.

For example, plaintiff's opposition argues (but cites no evidence to support the assertion) that "the allegations of sexual harassment did not arise until well after the inception of the search and seizure of plaintiff's office.[8] (Opp. at p. 4). The evidence, however, reveals that the investigative team only searched the office after the complaints had arisen; and that it was a major focus of the search. (Defts' Ex. "I", passim).

Although plaintiff claims that the items "seized" by the investigators from his office were not relevant, his personal characterization of their relevance (Ortega

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8. Emphasis added on "office". Apparently, plaintiff is equating the changing of locks on the office at the outset of the investigation with a "seizure", in an attempt to forestall any examination of the complaints of sexual harassment, which surfaced later in August of 1981, when the investigative team began interviewing female residents about the computer. Defts' Ex. "I", at p. 2. The first search occurred in mid-August 1981, well after the computer was taken, as well. Stratton Depo. Extract, Ex. "F" to Defts' Req. Jud. Notice.

Decl. at p. 3) is not the issue: the issue is whether or not the items were reasonably related to the focus of the investigation. That is a determination for the Court. *O'Connor v. Ortega*, at p. 729.

Given the allegations of coercion of residents, wrongdoing in acquiring of the computer, and sexual harassment, all of which predated the search by the investigative team appointed by Dr. O'Connor to investigate Ortega's Department, (Ex. "I", Investigative Report, at pp. 5-9), the reasonableness of the search and seizure appears manifest, in view of the Supreme Court's "dictum".[9] Id. at p. 728.

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9. Plaintiff, having unilaterally equated the securing of his office (part of the Napa State Hospital administration building) with a "seizure", then misleadingly states that "there were no allegations of sexual harassment at the time of the search . . ." (Opp. at p. 4). These attempts to apparently mislead the Court do not comport with the requirements of Local Rule 11-3(3).

ARGUMENT

I

PLAINTIFF'S CHARACTERIZATION OF THE REASONABLENESS OF THE SEARCH DOES NOT CREATE A GENUINE ISSUE NECESSITATING TRIAL

a. Plaintiff Cannot Avoid Summary Judgment By Contradicting His Prior Testimony Or "Testifying" That The Search Was Unreasonable.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, it any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, "if the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise in Rule 56, 'specific facts showing that there is genuine issue for trial.'" *T. W. Electrical Service, Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317 (1983); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986)). When judging the evidence at the summary judgment stage, the Court does not make

credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the nonmoving party. *T. W. Electrical Service, Inc. v.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

However, in ruling on a summary judgment motion, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 283 (1986). A party seeking to avoid summary judgment may not do so simply by submitting a declaration which contradicts that party's prior depositions, declarations or testimony,[10/] and the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts," otherwise there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., Ltd.*, 475 U.S. 574, 586 (1986).

b. <u>Plaintiff's Newly-Manufactured Declarations Do Not Suffice To Raise A Genuine Factual Issue As To The Reasonableness Of The Search.</u>

Plaintiff bears the burden of showing that the search of his office was unreasonable, under the guidelines for balancing announced by the Supreme Court in *O'Connor v. Ortega*; and the issue of

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10. In this regard, defendants refer to the plaintiff's deposition testimony and the findings made in the prior State Personnel Board proceedings, and in the decisions reviewing it, in which plaintiff failed to deny the charges of sexual harassment and failed to rebut the other charges.

reasonableness is one for the Court's determination. *O'Connor v. Ortega*, 480 U.S. at 729; *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985); *Everett v. Napper*, 833 F.2d 1507, 1512-13 (11th Cir. 1987) (§ 1983 plaintiff bears burden of showing unreasonableness under privacy claim to drug testing scheme).

Plaintiff, however, has utterly failed to raised a genuine issue of fact with respect to the reasonableness of the search, either in its inception or scope. *O'Connor v. Ortega*, 429 U.S. at 341.

i. Plaintiff's Conclusory Declarations Contradict His Prior Deposition Testimony, And The Findings Of The State Personnel Board.

The "evidence" submitted in opposition to the defendants' motion consists of the 1984 and newly-manufactured declarations of the plaintiff, Dr. Ortega.[11/] Plaintiff first asserts that his office was "searched" on July 31, 1981, when the door locks to his office had been changed. (1996 Ortega Decl., at ¶ 2). This testimony is not evidence, it is a legal conclusion which has no evidentiary value. *Papasan v. Allain*, *supra*, 478 U.S. at 283; *Thornhill Publishing Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979) (party may not defeat summary judgment by submitting self-serving, speculative and conclusory affidavit). The evidence that the investigative team searched the office only after complaints of sexual harassment and plaintiff's

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11. Plaintiff also submits his attorney's declaration as to the contents of the Donoviel and Owen depositions. As set forth more fully hereinafter, the depositions themselves rebut plaintiff's characterization of their content.

removal of the computer, is uncontradicted. (Defts' Ex. "I", at pp. 5-7; Ex. "F" to Req. Jud. Notice, Stratton Depo. Extract).

Plaintiff's newly-drafted declaration also seeks to debunk the importance of plaintiff's removal of the computer from the hospital grounds, after he was ordered to stay off (pending the investigation). (Ortega 1996 Decl. at ¶ 2). This position is inconsistent with plaintiff's prior deposition testimony (Ortega Depo. Extract, Ex. "E" to Defts' Reply Req. Judicial Notice, at p. 36, computer belonged to the State). Even the 1984 Gandhi declaration, in its only relevant portion, reinforces the removal of the computer as a major concern of the administration. (Gandhi Decl., ¶ 6).

Plaintiff's prior sworn deposition testimony is consistent with the defendants' documentary evidence, and Dr. O'Connor's testimony, that given plaintiff's lie that the computer had been "donated", that his removal of it generated intense concern, and also was a major factor leading to the search of the office. (O'Connor Testimony, 2-197; Defts' Ex. "BB") Plaintiff's newly-generated testimony is insufficient to raise a "genuine" issue as to the reasonableness of the search, at its inception. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572-73 (2d Cir. 1991).

Plaintiff also "testifies" that the other justifications for the search (illegal coercion of residents to purchase computer; punishing Dr. Vaughn in retaliation for not contributing) were "invalid" or "flimsy". (Ortega 1996 Decl. at ¶¶ 3, 5). These issues were also litigated adversely to him previously in the State Personnel Board, and affirmed on appeal. (Exs. "A" and "B" to Defts' Reply Req. Jud. Notice).

ii. Plaintiff's Characterization Of The Lack Of Necessity For The Search Of His Office, And The Securing Of Evidence For Use In The Disciplinary Proceeding, Is Likewise Insufficient To Create A "Genuine" Issue Of Fact.

With respect to the scope of the search issue, plaintiff's opposition likewise consists of a conclusory assertion by Dr. Ortega denying the need to search, i.e., Ortega's "testimony" that "none of the evidence presented against me at my disciplinary hearing was obtainable only by [entering] my office." (1996 Ortega Decl. at ¶ 5). The fact that only evidence relevant to the investigation were taken, and used for the disciplinary proceedings remains unrebutted by the opposition.[12/] Dr. Ortega simply disagrees with the fact that he was fired - that does not render the search unreasonable, as a matter of law. See *Papasan v. Allain*, *supra*.

Certainly, no legal support is provided to support plaintiff's bald assertion that the securing of the items from plaintiff's office which were directly relevant to the focus of the investigation was "unnecessary" and therefore, unreasonable. *O'Connor v. Ortega*, 470 U.S. at 726-27. Plaintiff, apparently, believes his office's contents were protected by an absolute privacy right. Unfortunately, for him, he is mistaken.[13/] "The

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12. Plaintiff's other belongings were boxed and secured so the office could be used. They were eventually delivered to him, despite his stating he "did not want them". (Defts' Reply Req. Jud. Notice, Owen Decl., at ¶¶ 1-5).

13. There is no requirement, in *O'Connor v. Ortega*;

search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct." 470 U.S. at 726.

Plaintiff simply has not, and cannot avoid summary judgment by asserting, in the guise of his declaration testimony, that defendants' conduct was unreasonable, especially where, as here, his testimony contradicts prior testimony and legal findings made against him in the State Personnel Board proceedings. See *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990).

Most tellingly, of course, is plaintiff's implausible denial of the existence of charges of sexual harassment against him at the time of the search by the investigative team.[14] This an outright fabrication, based upon semantic wordgames and half-truths. As noted by the State Personnel Board, plaintiff never testified that the substance of the harassment charges against him was "false". It is outrageous that he now attempts to characterize his sexual harassment of residents and supervised employees as "personal sexual matters that have no bearing on job performance." (Opp., at p. 7). The plaintiff's unexplained failure to deny the harassment charges during the SPB proceedings cannot be used to manufacture a "genuine issue" simply by submitting his own declaration

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New Jersey v. T.L.O., or elsewhere that holds that a plaintiff may avoid summary judgment simply by claiming (without any factual support), that other sources of information could have sufficed.

14. It seems quite clear from the record that plaintiff would not have been terminated had he not engaged in these activities.

contradicting his prior admissions. Plaintiff's self-serving statements are legally-immaterial and cannot overcome the substantial objective evidence to the contrary. *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985).

II

DEFENDANTS DONOVIEL AND OWEN CANNOT REMAIN IN THE CASE, AS THEY DID NOT PARTICIPATE IN, OR AUTHORIZE THE SEARCHES

Plaintiff's opposition evidence against defendants Dr. Donoviel (former Clinical Director at NSH) and Dorothy Owen (former personnel officer) consists of plaintiff's counsel's one-sentence "summary" of their depositions. (Graham Decl. ¶ 4). Although Dr. Donoviel and Mrs. Owen were present at administrative meetings where matters "such as" the Ortega investigation were discussed, (Graham Decl., at pp. 1-2), they did not authorize or participate in the searches complained of. Donoviel Depo. at pp. 13-14; Owen Depo. at pp. 49-50 (both attached as Exhibits to Defendants' Req. Judicial Notice in Reply).[15/]

This evidence is simply insufficient to hold Dr. Donoviel and Mrs. Owen in the case. *MacKinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995); *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989). Summary judgment in favor of them is clearly warranted, as well.

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15. Apparently, Dr. Donoviel and Mrs. Owen are being sued for their participation in the disciplinary proceedings.

CONCLUSION

Plaintiff has failed to present evidence sufficient to raise a "genuine" issue of material fact necessitating trial. He has failed to establish the unreasonableness of the searches complained of. Therefore, defendants respectfully request that summary judgment be granted in their favor.

DATED: February 1, 1996.

DANIEL E. LUNGREN
Attorney General

PAUL T. HAMMERNESS
Deputy Attorney General

Attorneys for Defendants D. Michael, Dr. O'Connor, M.D., Richard Friday, Dr. Stephen Donoviel, Ph.D., Dorothy Owen

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGNO ORTEGA, M.D., et al.,	**[Filed April 1, 1996]**
Plaintiff,	No. C-82-4045 MHP
-vs.-	JUDGMENT
DENNIS M. O'CONNOR, et al.,	Fed. R. Civ. P. 58
Defendant.	Entered in Civil Docket April 5, 1996

This action came on for trial before the court and a jury, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been tried, and the jury having rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, FRANKLIN FERNANDEZ [sic], recover of defendants DENNIS M. O'CONNOR and RICHARD FRIDAY jointly and severally the sum of $376,000.00 in actual damages; the sum of $25,000.00 in punitive damages from defendant O'CONNOR; the sum of $35,000.00 in punitive damages from defendant Friday; with interest on each sum from the date of entry of this judgment at the rate of 5.25 per cent as provided by law. Plaintiff is entitled to recover his costs of action and may apply for such attorneys' fees as are permitted by law.

IT IS FURTHER ORDERED AND ADJUDGED that as to defendants DOROTHY

OWEN, STEFAN DONOVIEL, and ASHER RUBIN, plaintiff take nothing, those defendants having been dismissed by the court in earlier proceedings and defendants OWEN, DONOVIEL and RUBIN are entitled to recover their costs of action.

IT IS SO ORDERED.

DATED: April 1, 1996

MARILYN HALL PATEL
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE: The Honorable J. P. Vukasin, Jr., Judge

MAGNO J. ORTEGA, M.D.,	)	**[Filed January 25, 1993]**
	)	C-82-4045 JPV
PLAINTIFF,	)	
vs.	)	SAN FRANCISCO, CA
	)	
DENNIS M. O'CONNOR, ET AL.,	)	DECEMBER 4, 1992
DEFENDANTS.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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In Propria Persona
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For The Defendants: Daniel Lungren, Attorney General of the State of California
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By: Paul T. Hammerness
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(PAUSE IN PROCEEDINGS)

THE COURT: I'm going to excuse the ladies and gentlemen of the jury for a few minutes. I'm going to ask you to go back to the jury room. At this stage of the proceedings, when plaintiff rests, there are certain matters the court has to address. Thank you.

(JURY NOT PRESENT)

THE COURT: Defendant ready to proceed with his case?

MR. HAMMERNESS: Yes, your Honor. I have a motion for directed verdict which I'd like to now serve on Dr. Ortega and file it with the Court.

(PAUSE IN PROCEEDINGS)

THE COURT: Your motion says it's submitted pursuant to rule 50(b).

MR. HAMMERNESS: Yes, your Honor. Oh, was it a typo?

THE COURT: I don't know. It says 50(b) --

MR. HAMMERNESS: It should be on --

THE COURT: -- And it seems to me it should be 50(a).

MR. HAMMERNESS: Should be 50(a), your Honor.

(PAUSE IN PROCEEDINGS)

MR. HAMMERNESS: Yes, it should be 50(a), your Honor.

THE COURT: Madam Clerk, give this back to Mr. Hammerness and have him correct it and initial it.

(PAUSE IN PROCEEDINGS)

MR. HAMMERNESS: I made the change, your Honor.

THE COURT: Thank you.

(PAUSE IN PROCEEDINGS)

THE COURT: This says "attorney general's office file copy." Is this my copy, or do you need this back?

MR. HAMMERNESS: I Have a conformed copy, your Honor.

THE COURT: This is my copy?

MR. HAMMERNESS: That's yours.

(PAUSE IN PROCEEDINGS)

THE COURT: Does the plaintiff wish to address the defendant's motion?

DR. ORTEGA: The defendants' motion rests on the assumption that all the facts are in. There is no way of knowing whether all the evidence, taken in the most favorable light in my case -- in my favor, would support the contention that I have -- that I cannot present evidence that will prompt the continuation of my -- of the trial, starting with my cross-examination.

The defendants do not feel that their cross-examination, even of me or of my witnesses, will be necessary. That is not -- that does not say that any findings there will be favorable to them, so I would like for the trial to continue with the defendants

presenting their case, and after -- after a period which is reasonable, when they can -- when they can no longer be surprised by the witnesses listed in the court's file, then I can continue to present my case.

If we do it the way the defendants are doing, it is under the same argument that caused the court of appeals to reverse the summary judgment the last time around, that there were facts at the time that favored me, and the decision should have been in my favor. When it went to the supreme court, five -- four of the justices said -- agreed with the court of appeals, five -- five said perhaps both courts and wrong, and more facts were necessary.

We have not really gone into what is claimed to be the facts, except by the defendants, and the plaintiff -- the plaintiff has witnesses that will counterbalance the claims of the defendants; those witnesses have to be heard if a fair trial can be supported on its merits.

Thank you, your Honor.

THE COURT: Thank you.

(PAUSE IN PROCEEDINGS)

THE COURT: Submitted?

MR. HAMMERNESS: Submitted, your Honor.

THE COURT: Federal rule of civil procedure 50(a)(1) provides, inter alia, if:

> "...There is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim...."

It appears to the court that the plaintiff did not establish a legally sufficient evidentiary basis for a reasonable jury to have found -- to find for the plaintiff on his claim. Or claims.

As a matter of fact, much to the court's surprise, it appears that in many regards the plaintiff enhanced the defendants' case, and in fact presented the defendants' case for the defendants on cross-examination of witnesses O'Connor and Friday. Earlier I was wondering if there was sufficient basis for the court to rule on a motion such as this at this stage absent presentation of testimony by the defendants on their direct case, but it appears that the plaintiff filled in any holes that may have been missing, and provided the evidence necessary for the court to be able to rule at this time.

Therefore, the court finds that defendants' motion for judgment as a matter of law at this stage is justified, that there's no legally sufficient evidentiary basis for a reasonable jury to find in favor of the plaintiff and therefore defendants' motion is granted.

Defendant will prepare a proposed order.

MR. HAMMERNESS: Yes, your Honor, I'll do that.

THE COURT: I would suggest that you obtain a copy of the transcript for use in preparation of the order.

MR. HAMMERNESS: I will do that, your Honor.

THE COURT: Okay. That will conclude this trial. I'm going to bring the jury back in and excuse them.

BRING THE JURY IN.

(JURY PRESENT)

THE COURT: Ladies and gentlemen of the jury, there is a phrase we find ourselves saying frequently in this judging business, and that is, when you walk up in

the morning, you never know what's going to happen that day. And it's true. Frequently things occur that we just don't anticipate. This may be one of those situations for you.

The law provides that after -- at certain stages in the proceedings, certain motions can be made to the court, even in a jury trial, where a litigant asks the court for a certain ruling. That has happened. We reached one of those stages. Such a motion was made, and I have ruled. And I have granted defendants' motion for judgment as a matter of law. And therefore I'm going to order the clerk to enter a judgment for the defendants -- in favor of the defendants, and against the plaintiff in this case, based on the record as it now exists.

There are a number of legal explanations I can give you; if we would stay here for another hour, I can give you a number of explanations as to how this comes about and what the standard is, but I felt it was appropriate, because that's how I ruled. And therefore this trail is concluded as far as the jury is concerned.

When we recess, or adjourn today, you will be excused from further service as jurors in this case. You have to give your identification tags to sergeant gabriel, either that, or we send the marshal out after you to get it back.

The admonishment that you may not discuss this case with anyone no longer applies. If you want to talk about it you can. However, if you don't want o, you don't have to. This is entirely up to you. If you want to talk about it, you may. If, on the other hand, you don't want to talk about it, you don't have to talk about it. If somebody comes around and tries to harass you or bother you, all you have to say is, "i'd rather not discuss it," and I suspect they will respect your wishes. If they don't, and they continue to bother you,

just tell them "no" and call me, because I will not tolerate people who have served as jurors in this court being harassed after they leave the courtroom. So it's entirely up to you.

I realize that jury service is a sacrifice of time and effort, and sometimes a financial sacrifice for people, but I want you to realize that performing as a juror is sometimes referred to as the highest duty of citizenship in this country. In the performance of your duty, you represented the conscience of the community; in addition, you represented approximately 480 years of collective wisdom and experience. We appreciate your contribution. I thank you for your time, your attention, your participation. Don't feel badly that this matter was resolved without your vote. Just accept it as one of the proceedings that happens in court. Thank you very much for your attention and your participation. You made a contribution to the judicial system.

Ladies and gentlemen, you're excused.

MR. HAMMERNESS: The defendants would add their thanks to the jury for their service.

THE COURT: Thank you.

DR. ORTEGA: So would the plaintiff. Thank you.

(JURY NOT PRESENT)

MR. HAMMERNESS: And of course, your Honor, thank you.

DR. ORTEGA: Thank you, your Honor.

THE COURT: All right. Thank you.

That concludes our proceedings at this time. There's nothing further.

To the parties wish to leave the exhibits with the clerk, or do you want the exhibits withdrawn?

DR. ORTEGA: I want the exhibits to stay on the record, your Honor.

THE COURT: You want to leave them with the clerk? All right.

DR. ORTEGA: Yes, your Honor.

MR. HAMMERNESS: That's fine, your Honor.

THE COURT: Very well.

When defendants' have prepared a proposed order, submit it to the plaintiff for his review and submit it to me.

MR. HAMMERNESS: I will, your Honor.

THE COURT: Thank you very much.

MR. HAMMERNESS: Thank you.

THE COURT: Court is adjourned.

(PROCEEDINGS ADJOURNED)

CERTIFICATE OF REPORTER

I, RAYMOND LINKERMAN, the undersigned Official Reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, pages number 1 through 422 inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

_____

RAYMOND LINKERMAN

PAGES 1 -43

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLE MARILYN HALL PATEL, JUDGE

MAGNO J. ORTEGA,	)	
	)	
Plaintiff,	)	
	)	NO. C 82-4045 MHP
vs.	)	
	)	
STEFAN DONOVIEL,	)	
DENNIS M.	)	
O'CONNOR A.K.A.	)	
NAPA STATE	)	
HOSPITAL	)	
DIRECTOR, ET AL.,	)	
	)	
Defendants.	)	
_____	)	

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, MARCH 6, 1996

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: Gilbert T. Graham, Esq.
22 Second Street, Sixth Floor
San Francisco, CA 94105

For Defendant: Daniel E. Lungren, Attorney General
State of California

50 Fremont Street, Suite 300

By: Paul T. Hammerness
Deputy Attorney General

Reported By: Leo T. Mankiewicz, CSR
Official Reporter, USDC

WEDNESDAY, MARCH 6, 1996 4:39 P.M.

THE CLERK: Civil Action 82-4045, Ortega, et al. versus O'Connor, et al., for pretrial conference. Counsel, your appearances, please.

MR. GRAHAM: Good afternoon, your Honor. Gilbert Graham for plaintiff.

MR. HAMMERNESS: Paul Hammerness for defendants.

THE COURT: Good afternoon. I gather you couldn't work it out.

MR. GRAHAM: No, your Honor.

THE COURT: How crazy. Okay, well, in any event, as I understand it, from looking through the papers and what the Clerk has pulled together, there are three motions in limine among you -- between you, I should say.

MR. HAMMERNESS: Right.

MR. GRAHAM: Correct, your Honor.

THE COURT: Well, let's take up those first, and we'll see where we go from there. One of them has to do with the witnesses. Mr. Clannon is not being called, is that correct?

MR. GRAHAM: That's correct, your Honor.

THE COURT: And with respect to Dr. Linn, was he at Napa when this incident occurred?

MR. GRAHAM: No, he was the predecessor to Dr. O'Connor.

THE COURT: And so when approximately did he leave in relation to this event?

MR. GRAHAM: I think that O'Connor had been there -- well, it was a relatively short time. I'm not sure if it was one year or four years, but a fairly short time.

THE COURT: Somewhere in that range.

MR. HAMMERNESS: He came in '78, didn't he?

DR. ORTEGA: I'm not sure.

MR. HAMMERNESS: Pretty sure he came in '78, your Honor.

MR. GRAHAM: And your Honor, --

THE COURT: Yes.

MR. GRAHAM: -- In response to this motion, I don't really intend to ask him the ultimate question of whether or not it's reasonable, in response to defendant's motion. It will really be just to testify to his experience and what was done, and whether he found it necessary to do this particular kind of procedure of searching somebody's office without their consent, when there's a disciplinary problem involved. I would not necessarily expect him to answer the ultimate question of whether or not defendant's actions were reasonable under all the circumstances.

THE COURT: Well, then he's being called less as an expert and more on the basis of his own personal knowledge of the circumstances there, and before I go to the "Um" part -- excuse me -- which I know is difficult for the reporter to get down -- what would he testify to about any occasions on which he ever searched someone's office or seized some item from their office?

MR. GRAHAM: I think, as I recall from talking with him, that what he would say is that -- I think they only did it once, and that was where there's a security

problem, but that they never searched the office of somebody who was, like, the head of a department.

THE COURT: What does that tell us? I mean, is the fact that there may be other alternatives part of the reasonableness equation?

MR. GRAHAM: I believe that it would be.

THE COURT: I mean, the Supreme Court seems to acknowledge that, yes -- first of all, they say, explicitly, there is an expectation of privacy, and in fact, they say, Dr. Ortega had an expectation of privacy.

MR. GRAHAM: Right.

THE COURT: They do say, however, that there are work-related searches which may be reasonable, and talk about some of the possible parameters of those. Can you introduce evidence, or are you attempting to introduce evidence to say that there could have been no reasonable basis for a search here at all?

MR. GRAHAM: Yes, we intend to have such evidence. I mean, that's our position, that on its face it was unreasonable, which the Ninth Circuit agrees with, but that was reversed.

THE COURT: Well, If any search at all was unreasonable, or that given facts that at the particular time involved did not give rise either to a search that would have been reasonable, or -- that the scope was unreasonable?

MR. GRAHAM: I think it would just be limited to these circumstances. I'm not going to try to get a pronouncement that a search under any circumstances would be unreasonable, no, but it would be where you still have an employee employed by the Hospital, to use a procedure allegedly to come into his office to separate State property from personal property, which is a policy that's for departed employees, that doesn't

make any sense, and that is the position defendants took for many years in this litigation, including the District Court, the Ninth Circuit, even the Supreme Court. That was their position, and I've cited that in our limine motions for sexual harassment. They said the reason they went in there is to use this policy for departed employees.

It doesn't make any sense. We're here, and we'll have to try that question, and it seems to me it will be helpful for the triers of facts to hear somebody who has had similar needs or circumstances presented to hem, and the way that he handled them.

THE COURT: Will he testify that there was in place already any kind of policy with respect to searching an employee's office?

MR. GRAHAM: So far as I know, there is not. There was not, and he didn't know of any, and I don't think Dr. O'Connor knew of any such policy.

THE COURT: Is that correct?

MR. HAMMERNESS: I think that is correct, simply because it was such a unique circumstance, that here you have the Head of the Department that is the residency program, that Dr. Ortega reported only to the executive director, that is, Dr. O'Connor, and, you know, I disagree that sexual harassment wasn't a reason, but, you know, I think that's a factual question to be determined.

My problem with Dr. Linn is, a, my understanding is -- and I haven't been able to depose Dr.Linn, so I don't know that -- but my understanding is that Dr. Linn was removed and replaced by O'Connor, under adverse circumstances.

From what I'm hearing that he's going to testify to, insofar as it's relevant, I think it falls with, as I put in my motion in limine, I don't see why we need some expert to give an opinion as to the circumstances of

this search. I mean, that's what the facts are going to show. The judge will instruct the jury as to what the law is, and just having experts on either side parrot whether or not they felt that was reasonable or not is really the jury's function. So --

THE COURT: Well, I don't think that he should be permitted to testify as an expert, actually, because that allows you to ask him perhaps hypothetical questions, and ask him, "based upon that, do you have an opinion as to ...," et cetera.

It seems to me that you have some legitimate reasons for questioning him, calling him as a witness, essentially to testify, "I had that position before; these are the circumstances that have come up and what I think you can do," and then, you know, "under those same circumstances, this is what I have done in the past, this is what I did before I did any searches, or what I instructed people to do if I did any searches," and let the jurors determine, based upon the standards given, whether or not the conduct here was reasonable, and for example, are there other alternatives besides a search, or the manner in which the search was conducted, and that would indicate that it was reasonable or not, you know, using his testimony, as well.

Because the question of reasonableness, as the legal standard, really is one for which this person I don't think can testify as an expert, or probably most people who would be in that position. It's the kind of thing that sometimes you will have experts come in and testify to in other contexts, but that's because they've been law enforcement officers for a long period of time, where they've had to do searches or train other people in doing those things, and then can opine on that, but this really isn't is field.

But I would permit him to testify, without hypothetical questions or conclusory ultimate issue answers, to what custom or practice he engaged in or is aware that other people engaged in, in that position, and what different administrative ways of handling it in that position he had used or would consider using. Okay?

MR. GRAHAM: All right, very well.

THE COURT: Maybe it's, you know, the label, maybe, or is misleading, and Clannon of course is not a problem because he's not going to be called, and there's no issue, I gather, with respect to Dr. Teitelbaum.

MR. GRAHAM: Apparently so, your Honor. I talked to Mr. Hammerness and he didn't object to that substitution.

THE COURT: Now, with respect to the other motions in limine, re: termination of employment, how is that relevant to the issues of the legitimacy of the search? Because what ultimately happened -- I mean, It's not as if somebody, for example, in a more typical State Police brutality case, is charged with -- you know, brings a 1983 action claiming the officer used excessive force, and you turn around and look and the defendant, plaintiff here, was convicted of, the defendant, of excessive force, and clearly, that would come in. That's part of the whole fracas that went on, but this is something that happened later.

MR. HAMMERNESS: Well, it -- obviously, they didn't -- the termination proceeding occurred after the search. The question is, what is the plaintiff's claim of damages. Clearly, it's relevant to that, and B, it's relevant to his bias. The theory of the case of the defendants is, and my expert will substantiate this, plaintiff suffered no damage as a result of the search

of its office. His -- what he's trying to do is recover damages for the termination.

So it's relevant to the damages, it's relevant to his motive in pursuing the lawsuit, and goes to his bias against the defendants. That's what I feel the relevance is.

Now, I don't want to re-try the termination. I think if we just limit it to the fact that he was, in fact, terminated, following a filing of charges, that would be sufficient. But I think clearly the jury is entitled to know what the outcome was. Otherwise, what will happen is -- and I'm sure the plaintiffs aren't trying to do this -- Is they'll raise the specter that nothing happened to Dr. Ortega.

THE COURT: Mr. Graham?

MR. GRAHAM: Well, it is true that the fact of employment of non-employment would come into play on the issue of damages, but it seems like that could be handled by a restrictive instruction that the damages are to flow only from the search and seizure. Nevertheless, let me address the easiest parts of the case.

It seems like any questions about all of these charges, you know, before the State Personnel Board or any claims or arguments that he was fired for A, B, C, D, E, F, and G, dishonesty and so forth, those are clearly out. Those are prejudicial. They have nothing to do with the search and seizure. The documents regarding it, those should be excluded, as well. If there's going to be any mention of it at all, I think it should be just a simple mention that his employment was terminated on such-and-such a date. It seems like --

THE COURT: Excuse me. How long did these termination proceedings go, over how long a period of time?

MR. GRAHAM: They went for quite a few months. I said may, but I think it wasn't quite that long. I think the decision was in May, but I think the last hearing was, I think, the end of the year, in December, and the decision maybe was a month or two after that. January or February.

MR. HAMMERNESS: The actual testimony, though, is, like, two volumes that size (indicating). So it was only a few days.

THE COURT: Well, I thought about this beforehand, and what it could be relevant to, and I do agree it could be relevant to the damages, and particularly what I'm thinking is if it went over a substantial period of time, and instead of the agony of having to deal with that, may well, you know, be part of the emotional distress, and the jury has to be able to assess that.

And therefore, I think the better thing to do is to essentially bifurcate the liability out, because I don't think it's relevant to anything having to do with the search or the legitimacy of the search and so forth, and let the jury make a determination on that, and then come back and try the damages.

And while I certainly don't want a retrial of the termination, I think that defendants are then entitled to ask whatever witnesses are going to be called by plaintiff, including the doctor, "well, would it make any difference, that he went through a proceeding that lasted for two or three months, whatever it was, and ultimately was terminated, and did he tell you about that? Did you factor that in your consideration?" But now they've heard about it on the liability phase.

Now, my question is, in connection with that, if we do that, is Dr. Ortega going to testify in the liability phase?

MR. GRAHAM: Yes, your Honor.

THE COURT: What does he have to testify to about the actual liability? Because the Supreme Court has said there is an expectation of privacy, so I think we can just tell the jury that, you know, that it is a determination. It has been determined that Dr. Ortega did have an expectation of privacy in his office, desk, whatever, you know, property that you want to refer to, and then it's up to you to determine, based upon all of the evidence, the reasonableness, justification, so forth, and go through what the definitions are of that.

What could he testify to -- because he wasn't there when the search occurred.

MR. GRAHAM: Correct.

THE COURT: What could he testify to as to the legitimacy of the search?

MR. GRAHAM: I think that he's one of the most important witnesses, if not the most important witness, because he needs to testify to the underlying facts to show the jury what goes into determination of reasonableness under the totality of the circumstances, and these would include facts such as his lack of any discipline before, the fact that he was a trusted department head for 17 years, the fact that he was in his office that was locked -- I mean, that he had sole access to; that even when the head of the department came up -- and I think this is not just going to the issue of whether he had an expectation of privacy, which of course is relevant to that issue, but it also goes to the issue of whether or not somebody -- in these circumstances, it's reasonable to search his office in the middle of the night and pull out valentines and use them against him and so forth.

THE COURT: Well, then -- I mean, I could understand circumstances where that would be the case. I could understand that one could essentially just

call the people who did the search, and that may be enough.

MR. GRAHAM: Right.

THE COURT: And I'm not going to second-guess you on that. But I think if he is going to testify, at that portion of the trial, defendants have to be able to impeach him to some extent, and so what I -- by saying, well, you know, you got a grudge, you know, whatever, however you want to ask it, you know, you were terminated, you were not terminated, not suggesting you can use those terms --

MR. HAMMERNESS: How about "fired"?

MR. GRAHAM: Axed.

THE COURT: "Axed," did you say?

MR. GRAHAM: Being sarcastic.

THE COURT: But I think you can ask that question, but you cannot, for the purpose of liability case, go into any greater depth than that. I think that ha to wait until the damages phase. And I think that's sufficient to get at the issue of bias: well, you know, he's unhappy because he was fired, terminated, or whatever, and that, therefore, he has some bias or prejudice against us, and that's why he's pursuing this action, whatever. You can make these arguments then, but not to go into any of the details and so forth. Okay?

MR. GRAHAM: It may be a little difficult, I haven't thought out your proposal before, but I would see that the questions are going to come up, what happened to the belongings in his office, and it's going to be kind of hard to divide it, frankly, because what happened is they entered his office, locked him out, wouldn't let him use it, and then kind of everything flows into one another.

They then took certain prurient parts of his personal belongings and used them against him. They

used other things to launch investigations into certain charges, so it's -- they shouldn't have, like, Medi-Cal patients and things like that, but It's very hard to divide that.

THE COURT: But the issue here, though, on which this jury is going to be asked to determine whether there's liability is whether the search itself, either in its inception was reasonable, or -- well, number one, not either -- in its inception was reasonable, and whether it thereafter went beyond the scope of what was reasonable.

MR. GRAHAM: Right. And it's that part of it that will be hard to separate from the termination.

THE COURT: Well, but I think that goes to what the search -- what they looked for, what they searched, you know, if they went through the drawers and ransacked them or whatever, and pulled out of all kinds of stuff, including files that, you know, were marked "Personal," "Confidential," or something. I mean, I'm just throwing out some possibilities.

What they ultimately did with that, the items that they seized, I think tome really goes to the issue of liability, because if their search was unreasonable, doesn't matter whether they put them all back intact or whether they used them against him later on. That's the gravamen of his complaint here.

MR. HAMMERNESS: I think it does go to reasonableness and liability, in the sense that, if they took these items and then did not use them in the termination, that would be evidence of their state of mind that -- at the time they took it, that is, that they weren't looking for relevant evidence, they were just, you know, I don't know, voyeurs or something.

So the fact that they took evidence and that they then submitted that to the Attorney General to use at the termination I think goes to their state of mind, and

so in that sense they would be -- it would, I think, be relevant to liability.

THE COURT: But that state of mind is really not relevant, at least at that stage of the proceedings, because it's a question of what a reasonable -- It's always the objectively reasonable standard; what a reasonable person in that administrative position would have done under the circumstances. In other words, would they have searched, you know, for those items, given the stated reason for the search, and would they have seized these items and so forth. Lots of times things are seized that ultimately are not used in evidence, even in a criminal proceeding.

MR. HAMMERNESS: Right.

THE COURT: But that doesn't mean that the seizure of them, in and of itself, is unreasonable.

MR. HAMMERNESS: Sure.

THE COURT: Just may mean that it's, you know, excess evidence or really turned out not to be as relevant as they thought it was. The real question is, what was going on when they did this. Because if they can't justify the search in its inception, doesn't matter what they do with all this stuff. If they put it all back the same night, they could still be liable. Now, the nature of the damages might be much different, but that comes much later.

MR. HAMMERNESS: I guess what I'm saying, circumstantial evidence of their state of mind at the time they performed the search, what they did with the evidence. In other words, if they had taken the evidence, and they did not give it to the Attorney General, I don't know, I guess circulated it around the Hospital or something, it would seem to me pretty -- that would negate their -- the reasonableness, at the time of the search.

THE COURT: And in the damages phase of the trial.

MR. HAMMERNESS: It would seem to do so.

THE COURT: I don't think we need to get into all that. Otherwise, I think we end up traipsing through the termination proceedings, which we really shouldn't do, and that's not what this case is about.

MR. HAMMERNESS: Right, I agree.

THE COURT: So I'll keep a fairly close rein on that. And in terms of the -- it's going to be the same jury, Mr. Graham, so in terms of the bifurcation, I mean, obviously, they will have heard some of the evidence already, and that will go into their equation when they get to the damages phase. But we will make sure that they only hear as much as they need to hear -- and to the extent it spills over, you know, so be it -- but what they need to hear in order to determine the issue of liability, and they'll be given specific, you know, questions and instructions related to that, and told that once they've made that determination, they'll come back and hear additional evidence. Okay?

MR. GRAHAM: Very well, your Honor.

MR. HAMMERNESS: Incidentally, I wanted to respond to this -- Mr. Graham's statement about the fact that the Attorney General, I guess, three years after the termination, didn't state that sexual harassment had arisen at the time of this --

THE COURT: Well, hold on just a minute. One at a time. That's the next motion in limine, and how that comes in, or if it does. And if you'll excuse me, I'm going to stand up. I've been sitting here all day, and --

MR. HAMMERNESS: Sure.

THE COURT: -- And I don't need to stand or sit on formalities with you, I gather, for a pretrial. But

it gets a little tiresome after awhile. Probably you'll be able to hear me better anyway.

MR. GRAHAM: I hope you got your lunch that you missed earlier.

THE COURT: Something. I just ate it too quickly. I wonder about this, because it didn't appear that the sexual harassment issue surfaced until very late in the game.

MR. HAMMERNESS: That's not true, your Honor. It's clearly not true. I understand that Mr. Graham is saying that. The fact of the matter is, and defendant's Exhibit I, the investigator's report, shows, and there's testimony, not only Dr. O'Connor, but the testimony of Dr. Laskey, that after they began the investigation, but before the contents of Dr. Ortega's office had been reviewed, that they began -- because they're interviewing the residents about the computer. At that time they began to receive the complaints of sexual harassment, and independently of the investigation, the library assistant came to Dr. O'Connor and reported sexual harassment. The investigators told Dr. O'Connor this, and he then asked them to review the contents of the office.

THE COURT: Well, let's go back in time. Maybe, although I've read in several places, you know, the facts, but let's just get them on the record and make sure I have the sequence.

MR. HAMMERNESS: Sure.

THE COURT: At some point before the search occurred, as I understand it, there was an investigation initiated.

MR. HAMMERNESS: Yes, your Honor, that's true.

THE COURT: And at some point before that search, Dr. Ortega was asked to take administrative leave, and then took, instead, took vacation?

MR. HAMMERNESS: Correct.

MR. GRAHAM: Yes.

THE COURT: And essentially told not to come to his office or something?

MR. HAMMERNESS: Well, he was told he could return, but he had to request permission.

MR. GRAHAM: Yes. I'm not sure there was any investigation, really, before this search. Basically, it depends what you call an investigation.

THE COURT: Well, it was a complaint, and maybe some investigation or inquiry had been made, maybe hadn't been a thorough investigation yet.

MR. GRAHAM: I think July 28th and 29th, or when Dr. Vaughn complains about his speculation that Dr. Ortega may have coerced certain residents into contributing to the purchase of a computer, then it was virtually the next day, I think July 30th, when Dr. O'Connor met with Dr. Ortega and first wanted to put him on administrative leave, but then Dr. Ortega said, "I'll take vacation leave instead," and I think there is a difference, I mean, on exactly when the search occurred, but we know for sure August 15th and 16th it had already occurred. There's one witness who says it happened on July 31st, but I would indicate to you that I have never seen a document in this case where somebody states under oath that the sexual harassment complaint occurred before the search of this office. And I have raised this issue before this Court several times, and in response to this motion, there is nothing.

I have shown the sworn testimony of the main defendants, almost all of them, Dr. O'Connor, Mr. Friday, and Mr. Stratton is not a defendant, but he was one of the persons that searched the office, the three people who would most likely know, and if I can't rely on responses to discovery, what can I rely on?

Sexual harassment -- they don't mention sexual harassment allegations; representations to this Court by defendants and their counsel, to this Court, to the Ninth Circuit, even to the Supreme Court, they can't then wait for trial several years later and say, "Oh, by the way, there's something else we forgot to mention."

I'm entitled to rely on that. A sexual harassment claim -- each one of these could be a trial. I mean, I'd have to go into the person's relationship with Dr. Ortega, in both employment and personal, the circumstances behind it. I have not deposed them, because I didn't think it was necessary, relying on their responses to discovery. It would be very prejudicial --

THE COURT: Now, hold on just a moment. I understand what you're contending. In the Supreme Court decision there is some reference to sexual harassment. I don't know where that came from in the record exactly, because obviously they don't put in a reporter transcript notation.

But according to the testimony that you think you will elicit from your witnesses who did the search, when did they do the search?

MR. HAMMERNESS: They did this -- the search of the office occurred after the complaints of sexual harassment.

THE COURT: No, no, I want a date.

MR. HAMMERNESS: What exact day, the problem is, I can't give you that, your Honor, simply because the person who performed the report is dead. However, from what I can tell, it occurred after August 15th, after the computer had been removed from -- Dr. Ortega came back to his office and removed the computer.

THE COURT: Well, let me ask you this: How did they know the computer had been removed?

MR. HAMMERNESS: I believe it was reported by the secretary in the office of Professional Education.

THE COURT: And it did not require an entry by the director or anyone else who was conducting an investigation or looking into any of the allegations going into his office and making that determination?

MR. GRAHAM: Your Honor, if I could just ask the plaintiff, because he will know, because he picked up the computer from the hallway outside of his office on August 15th or 16th. He will know whether the search had occurred and whether he been locked out at that time.

Had you already been locked out at that time: Just yes or no.

DR. ORTEGA: I had been locked out before then.

MR. GRAHAM: Before then, okay. So it had occurred before August 15th or 16th.

THE COURT: Well, was there more than -- assuming it's around that date, was there more than one search?

MR. HAMMERNESS: Yes, there was, clearly. The --

THE COURT: Now, the first one occurring when, then approximately? Around August, or early August, or by August 15th?

MR. HAMMERNESS: I don't know the answer to that. To the -- as best as I can tell, when they actually went into the office to review the contents of the desk, it was after they had interviewed Dr. Ortega and asked him about the charges of sexual harassment. So he might be able to place the date better, but --

THE COURT: Well, how much time elapsed between the first search and the second one? I want to hear what their facts are, okay?

MR. HAMMERNESS: Sure. Well, it depends. Between the search when they went in to...see, I think there were two searches, actually.

THE COURT: Okay, so what I am trying to find out is the time frame between --

MR. HAMMERNESS: Mid-August for the first search, and then early September for the -- or late August for the second.

THE COURT: Now, what did they search on the first search?

MR. HAMMERNESS: On the first search, they went in and just reviewed the contents of the office. They were looking for specifically any evidence of Dr. Ortega's mismanagement of the residency program, anything showing improper personal relationship with residents, and anything concerning the discipline of Dr.Vaughn, and anything concerning the computer.

THE COURT: Now, by the misconduct or whatever, with respect to the residents?

MR. HAMMERNESS: Correct.

THE COURT: Did that relate to this claim that he was pressuring them to give money for the computer?

MR. HAMMERNESS: Yes.

THE COURT: Was there anything at that time about sexual harassment?

MR. HAMMERNESS: Yes, your Honor.

THE COURT: What was there? What reports did they have or what information are they going to testify they had at that time?

MR. HAMMERNESS: They will testify that before they -- well, via the investigative report, that before they reviewed the contents of Dr. Ortega's office, they had began interviewing residents about the computer. During the course of those interviews, the

residents began to complain of sexual harassment by Dr. Ortega.

Independently of that, the library assistant Ms. Morgan came to Dr. O'Connor directly -- and this is nothing new, this was all evidence that was put in at the termination hearings in 1981 -- that the library assistant came to Dr. O'Connor and made the complaint of sexual harassment before anyone went in looking for evidence.

THE COURT: Well, now, the question that comes, then, --

MR. HAMMERNESS: And that's why they went in.

THE COURT: Well, that gets to the next questions. Was that a reason why they went into the office or searched the office?

MR. HAMMERNESS: Yes.

THE COURT: On either the first or second occasion?

MR. HAMMERNESS: Yes.

THE COURT: And if so, then way isn't that stated in the interrogatory answers?

MR. HAMMERNESS: I -- well, it's stated in our interrogatory answers that -- since I've been in the case.

THE COURT: But not in the original interrogatory answers.

MR. HAMMERNESS: I can't answer that, your Honor. I don't know why. It could have been that at the time the attorney assigned to the case was unaware of it. Clearly the plaintiff was aware of it, since he'd been interviewed about the charges.

THE COURT: Well, what does one search for if there is a claim of sexual harassment made? I mean, is that a basis for conducting a search, number one, in

and of itself, and number two, what does one search for?

MR. HAMMERNESS: They search, amongst other things, for evidence of improper relationships between the subject of the investigation and persons whom that supervisor or head of the residency program had supervised.

THE COURT: Well, generally if you have claims of sexual harassment, they're going to be claims, if it's a male that's being charged with sexual harassment, claims by a female, or perhaps a male, depending on what the circumstances are, that this person importuned them in connection with their activities, asked them to do certain things, created a hostile work environment, whatever.

What would you expect to find in somebody's desk, you know, that they sent dirty notes to the person or had some of their lingerie, or ...? I don't know. I'm trying to figure out --

MR. HAMMERNESS: Possibly.

THE COURT: It would sort of leave open sort of a wild chase through anything that might be there, because usually, that would not be -- usually you wouldn't have a file that says, you know, "sexual harassment, people I've harassed."

MR. HAMMERNESS: That's why they look at the contents of the desk.

THE COURT: But that essentially gives you an open-ended opportunity to peer through everything that may be of a personal nature.

MR. HAMMERNESS: In the office, correct, if it's related to the investigation, which it was.

THE COURT: Let me get back to this first search.

MR. GRAHAM: You Honor, --

THE COURT: Hold on a minute. Let me get back to this first search. Maybe it's linear thinking or something, but let's sort of get through this step by step here.

MR. HAMMERNESS: Nothing was seized.

THE COURT: Well, you said there was an inventory. Did they make a list of items that they saw?

MR. HAMMERNESS: No.

MR. GRAHAM: No, they didn't, your Honor. I don't really agree there was one search. What happened, according to the testimony of the defendants in their deposition, is that they went in, changed the locks, and then they would go in willy-nilly. Mr. Friday testified he would go in, I think he said, five or six times, at night, by himself, to look over documents, making no records, nothing, no inventory. Even then he said the reason he went in was to take an inventory. Mr. Stratton said --

THE COURT: Okay, I just want to hear what their version is.

MR. GRAHAM: I'm -- okay, I understand that.

THE COURT: Okay, so your contention is nothing wa seized.

MR. HAMMERNESS: Correct.

THE COURT: Did they do a written inventory of any of his stuff?

MR. HAMMERNESS: No, they did not. When they went in, they simply reviewed it, saw what was there, including the -- apparently the valentine and the other records about the residents, and they noted there was an absence of records, as well. They made no inventory.

THE COURT: Did they open drawers --

MR. HAMMERNESS: Yes.

THE COURT: -- And things like that?

MR. HAMMERNESS: Yes, they did. Apparently.

THE COURT: Did they take things out of those drawers?

MR. HAMMERNESS: I don't know.

THE COURT: Or take them out and put them back, or leave them out?

MR. HAMMERNESS: I don't know that, your Honor.

THE COURT: And then, at some point they went back again, and seized some items.

MR. HAMMERNESS: Correct.

THE COURT: And you know, if you take plaintiff's version of the action, they may have gone back more than once.

MR. HAMMERNESS: Correct.

THE COURT: And then --

MR. HAMMERNESS: Then, after they had done that, the decision, the investigators wrote up their report stating what evidence they had found, and noting that claims of sexual harassment, noting the fact that there was evidence that the residents had, in fact, been coerced, noting that Dr. Vaughn had been placed illegally on leave, and the investigative team then recommended to Dr. O'Connor that he terminate -- seek termination.

At that point in time, after the notice of termination went out to Dr. Ortega, they came back into the office to clear it out. At that point, apparently, they started an inventory, but there was just so much stuff there that they gave up, boxed it all up and put it in a secure place, and told Dr. Ortega he could come get it whenever he wanted it.

THE COURT: Well, at what point did they seize some of these items, some of the records and some of the other items, that, you know, that have maybe --

have other questions about them, such as a valentine and some of the other things? When were those seized?

MR. HAMMERNESS: From what I can tell, second half of August of 1981.

THE COURT: Second time they went back in, according to your version of the facts?

MR. HAMMERNESS: Right.

THE COURT: After they had changed the lock on the door.

MR. HAMMERNESS: Well, the lock was changed right from the get-go, at the end of July.

THE COURT: You know, that raises an interesting question to me, which I think the Supreme Court sort of probably has taken care of it anyway at this point because of a couple of things it said in the opinion, but I'm wondering why it wasn't raised before. It's a little late no.

What was the exigency to do a warrantless search? If they changed the lock ont he door and he wasn't there, to remove things, why couldn't they have got a warrant?

Now, that raises another issue, you know, for such things as administrative warrants, I'm aware. Usually those are things like, you know, an Occupational Health and Safety kind of agency or other kind of agency, administrative agency that has the authority to issue warrants, and I don't know who you would go to to get a warrant in a situation such as this.

But it does raise that issue, something that's never been raised before, and the Supreme Court seems to suggest that you could do searches without warrants in this context, so I guess that's, you know, by the bye, as they say.

MR. HAMMERNESS: Water under the bridge.

MR. GRAHAM: I think the four dissenting justices did mention that. They certainly thought you could get a warrant, and it seemed as though the majority was trying to establish the general rule for a search within the workplace.

THE COURT: Right, and in the context of a public employer, vis-a-vis public employee.

MR. GRAHAM: That's right, not connected to these particular facts, which is what the dissenters accused them of.

THE COURT: But -- I mean, that's essentially what you would have in the context of instances where you can get a warrant, and you got control of it, now you go get control of it.

MR. GRAHAM: You had security guards doing it, too. It was not just an office supervisor.

THE COURT: Now, I guess we're beyond that point, so that's maybe idle speculation about where that would come out.

Mr. Graham, I think what's going to have to happen is the same thing that happens when we do these in the context of police cases. If there are after-thought-up facts or if, in fact, there's a contention that they were there at the time, that they weren't included in the police report or whatever else, it comes in, and then you just, you get to cross-examine the living daylights out of them, I guess, about, you know, where did this come from.

Now, what I will do is this. I will limit that testimony about any charges of sexual harassment until we have heard the testimony on direct, and I assume you may be calling some of these witnesses because you want to nail them down in your case in chief as to what it is they were going in there and looking for, and what was the purpose of their search and so forth,

and to see what they articulate, before we get into anything in greater detail, and --

MR. GRAHAM: I understand the possible attraction of that, of crossing them with their own words, but it's too prejudicial, you know, especially -- I don't know if I understood you, that the complainants themselves, they're listed on the witness list, will they be allowed to testify, and then we get completely into a different trial?

THE COURT: No, No, because it's only a question of what information they had.

MR. GRAHAM: I would ask the court at least to require this, the Attorney General -- the defendants to present at least two declarations from Dr. O'Connor and the complainant stating exactly the date that complaint was made, and the date of the search, because I put in a lot of proof; I have seen nothing from defendants. There should be a preliminary showing to back up the words of counsel that this occurred ahead of time, particularly in view of their sworn responses to discovery.

THE COURT: Did you take Dr. O'Connor's deposition?

MR. GRAHAM: Yes. He didn't mention sexual harassment. They quote his own testimony over and over again in their own briefs, saying it was, they really went in for the computer.

MR. HAMMERNESS: I don't believe that's accurate.

MR. GRAHAM: Well, I would like to read his testimony --

THE COURT: Wait. I think maybe the best thing to do is this. And I am also looking at the hour and I have -- I'm sorry, but I have someone who's waiting for me, as well, that's been waiting on an administrative matter, and it's been a long day.

I think it may be wise to try to, rather than rush into a jury trial first thing Monday morning, to try to iron out some of these things, and then maybe pick a jury Tuesday morning. But maybe a worthwhile use of our time Monday morning would be to do a voir dire, instead of declarations, and let's just get the witness on the stand, or witness, whoever -- it's going to have to be those persons who either determined that the search was going to be made, or conducted the search, or both -- as to what they were either told to do in conducting the search, or the person or persons who decided that a search should be conducted, to have those persons testify, and you can cross-examine them, and I'll weigh it over, obviously, outside the presence of the jury, and decide whether they've made a threshold showing sufficient to let them to into it, okay?

MR. GRAHAM: All right. Who would that be, your Honor?

THE COURT: I don't know. You're going to have to identify these people. Dr. O'Connor, I assume.

MR. HAMMERNESS: Well, you don't want the complainants, right?

MR. GRAHAM: I think it would be crucial to have the complainant to know when they complained. Otherwise, Dr. O'Connor can say, "yes, I got it before the search." There's no way we can impeach him or anything else. The complainant will, though.

THE COURT: Fine.

MR. HAMMERNESS: Bring them in.

THE COURT: Who made the decision, Dr. O'Connor?

MR. HAMMERNESS: Dr. O'Connor definitely.

THE COURT: Did he conduct the search himself?

MR. HAMMERNESS: No, he did not.

THE COURT: Did he direct people to conduct the search, and tell them what the purpose was and what to look for?

MR. HAMMERNESS: Well, yes, he did.

THE COURT: Compound, yes.

MR. HAMMERNESS: Yes, he did. Exhibit I, your Honor, defendants' Exhibit I.

THE COURT: Well, I would say at least Dr. O'Connor, one or more of the complainants, whoever he's contending gave him information.

MR. HAMMERNESS: I wasn't planning on calling any complainant, so I haven't contacted any.

THE COURT: Well, so what you can do between now and then, between now and Monday morning.

MR. GRAHAM: Could I be advised now on what person, if any, he's going to try contract?

THE COURT: Or as soon as he finds out, as soon as possible, yes, by tomorrow. I would hope by the end of the day.

MR. GRAHAM: And the issue will be whether or not they did have evidence of sexual harassment as a possible justification for the search.

THE COURT: Yes. What does he claim now were the reasons for the search, and if he's contending that at the very inception, or at some point before this second or subsequent rounds going in there, were the basis for a search or seizure, and if one of those basis is sexual harassment, you can go into it on cross-examination, "well, why didn't you raise it before," or whatever.

MR.HAMMERNESS: Right.

THE COURT: And if one of those is sexual harassment, "when did you get the complaint," "who did you get it from," and et cetera.

MR. HAMMERNESS: Fine, your Honor.

THE COURT: And then you better find out who that complainant was, or complainants were, that preceded that date, and try to round them up to come in to testify.

MR. HAMMERNESS: Right. I'll try, your Honor. I have a -- I wasn't planning to call them, because, as your Honor has indicated, the issue is not whether, in fact, they have been harassed. The issue is whether they had made complaints of harassment, which they had.

THE COURT: Okay, but -- and that's not the question. The question of them is not whether they really were harassed. They could have made it up.

MR. HAMMERNESS: Sure.

THE COURT: The question is what Dr. O'Connor knew. For example, suppose somebody said to him, "well, I think I was harassed. What did you think." And tells him what happened, and she says, "well, if it will help you with your investigation, I'll say that." That's an entirely different scenario, and --

MR. HAMMERNESS: There's no evidence of that.

THE COURT: I'm just giving you -- I'm not suggesting that's the case, but that's the kind of thing where obviously Dr. O'Connor has, you know, has more than a few problems, including what he knew and so forth. As opposed to, she says, "you know, this guy's harassed me for a couple of years, and I would like for you to look into it, because I think other people have been harassed," and I don't think he has to inquire beyond that, --

MR. HAMMERNESS: Fine.

THE COURT: -- To say that he was on notice before that date. Then it seems to me, you know, did

what he did thereafter -- was it reasonable. that at least gets him into that.

With respect to the jury instructions, it doesn't look to me as if there are a lot of disputes. I think some of them with regard to the interpretation of the Supreme Court decision can be synthesized substantially, so as not to be repetitive.

The only think I would like to get nailed down is this qualified immunity issue, and what it is that you claim gives rise to the qualified immunity. Is it some uncertainty of the law at the time?

MR. HAMMERNESS: Correct.

THE COURT: Because some of the instructions or assertions I saw made really are sort of like in the police brutality cases. It's a mirror image of the plaintiff's claim, and that's really not qualified immunity. He says it was unreasonable, you say it's reasonable. That's not qualified immunity. I mean, that's essentially rebuttal of plaintiffs' case, okay?

MR. HAMMERNESS: I did address the qualified immunity issue in my trial brief.

THE COURT: Right.

MR. HAMMERNESS: And I excerpted the Court of Appeal decision, which essentially held that due to the lack of clearly established law, that it was, in fact, a legal determination.

THE COURT: Now, what was -- well, first of all, why wasn't that a motion, you know? Why wasn't a motion made on qualified immunity?

MR. HAMMERNESS: It was a motion.

THE COURT: When?

MR. HAMMERNESS: Back in 1990, I believe, your Honor.

THE COURT: But not in connection with this last -- since you've been back before me.

MR. HAMMERNESS: No, correct, your Honor.

MR. GRAHAM: I'm not sure it was. I don't recall it.

THE COURT: Okay, you would agree that the only basis you really have for qualified immunity, if you have one, is the possible unsettled state of the law? Correct?

MR. HAMMERNESS: I'm not sure I would agree with that, your Honor, simply because one of your grounds for denying the summary judgment motion, as I understood it -- it has been denied -- was that there was a question as to the state of mind of the defendants, that is, whether or not they took action for the reasons they gave. As I understand it, that's the only reason we're having a --

THE COURT: Well, that is not what qualified immunity is. I mean, that goes to their objectively reasonable basis, the reasonableness of their conduct, and intent, to the extent that it was not a negligent act. I mean, they --

MR. HAMMERNESS: Right.

THE COURT: But there need not be any intent to violate his constitutional rights. That's not a requirement under 1983, only that their conduct was intentional, and clearly when they went and searched his office, it was not unintentional. They knew what they were doing. So whatever their state of mind was generally would be irrelevant.

MR. HAMMERNESS: If that's true, then it's simply a legal issue.

THE COURT: It's the legal issue. Now, what is the state of the law that was uncertain?

MR. HAMMERNESS: Whether or not there was a -- it was reasonable or not to search an employee's office for evidence of work-related misconduct, without a warrant.

THE COURT: Yes. As I read the Supreme Court decision, I don't think they're staking out any new law except for the standard. I assume from that decision that, not having been privy to the earlier proceedings, I assume that the plaintiff's position in that case was that -- or earlier, was that defendants required probable cause, or there should have been probable cause, and the Supreme Court disagreed with that.

But if you look back at all the cases they've cited to -- and certainly the law in the Ninth Circuit, up until that time, was reasonable cause, and that's defendant's position, and has been all along -- all we need is reasonable cause.

And the other thing that the Supreme Court laid down was that, in this context, in this case, it could not be resolved on summary judgment. I don't see that they really stake out any new law. I mean, I would think that it would be reasonable for anyone to feel that if they were going to conduct a work-related search, which they contend, and the law prior to that time had said -- albeit not necessarily from the Supreme Court directly in this context -- that it had to be reasonable, knew that it had to be work-related, you certainly could not conduct a search, either from its inception or in scope as an employer, essentially to dig out or ferret out dirt on somebody's personal life that was not work-related.

MR. HAMMERNESS: Right. Oh, yes.

THE COURT: Right? So I don't know what new plan there really is there. So think about that between now and Monday. I want that resolved.

MR. HAMMERNESS: I will do that, and this thing, do you want me to put on Dr. O'Connor, then, and explain it, or did you want him to?

THE COURT: However you want to do it, I really don't care; if you want to call him first, you want to call him and put him on, and then you cross-examine. Obviously, it's not your witness, you can call him under 611. The two of you work that out.

MR. GRAHAM: Then 9:00 o'clock, your Honor?

THE COURT: Yes, we'll see you at 9:00 o'clock, and what we'll do is we'll defer calling a jury until the next morning. We will get all these items hashed out and we'll all be better rested, or at least I will be, and start jury trial on Tuesday.

MR. HAMMERNESS: Your Honor, it might help -- I did prepare a bench pack of exhibits.

THE COURT: Good.

MR. HAMMERNESS: Which I'd be happy to turn over to you, and it does have all our exhibits, so -

THE COURT: Fine.

MR. HAMMERNESS: Would you like that?

THE COURT: And I'll take up any objections to these as well as any voir dire issues, or the jury instruction issues on Monday. Do you have an exhibit book or folder?

MR. GRAHAM: Yes. I was told not to bring it until the day of trial.

THE COURT: All right, why don't you bring it in on Monday.

MR. HAMMERNESS: did you want mine, or shall I bring it Monday?

THE COURT: Well, you can give it to Lurline if she has room to keep it. I'll leave that up to her.

Also, what's your estimate as to trial time, so we know what to tell the jurors?

MR. GRAHAM: You don't have trial on Friday, right?

THE COURT: No, we have civil law and motion, and we run from 8:30 to 1:30, because we have things like this in the afternoon.

MR. GRAHAM: I think some of your rulings today will shorten it somewhat, but optimistically, I was figuring six to seven days. In fact, I had -- yes, I have six to seven days.

THE COURT: Are you going to call all those witnesses on your list, or is that sort of an outside ballpark list?

MR. GRAHAM: There may be two or three of them that won't be called.

THE COURT: Looks to me like there might be some duplication of testimony. So pare them down to the ones you really need. So six or seven days?

MR. HAMMERNESS: Sounds reasonable to me, your Honor.

THE COURT: We'll see you Monday morning at 9:00 o'clock.

MR. HAMMERNESS: Thank you.

THE COURT: Thank you. Sorry we kept you waiting.

(PROCEEDINGS CONCLUDED AT 5:37 P.M.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, Plaintiff,	)	
vs.	)	No. C-82-4045-MHP
	)	MONDAY
DENNIS M.	)	MARCH 11, 1996
O'CONNOR, ET AL.,	)	9:00 o'clock a.m.
Defendants.	)	San Francisco, California
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE

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MR. HAMMERNESS: I will call Dr. Pranger to the stand.

THE CLERK: Please raise your right hand.

(Thereupon, the witness was sworn.)

DR. PRANGER: I do.

THE CLERK: Please take the stand.

Please state your full name, and spell your last name for the Court.

DR. PRANGER: Margaret, middle initial A., last name Pranger, P, as Peter, r-a-n-g-e-r.

THE CLERK: Okay.

Thereupon--

DR. MARGARET A. PRANGER

was called as a witness on behalf of the Defense, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HAMMERNESS:

Q: It's Dr. Pranger; is it not? You're a doctor; is that true, ma'am?

A: Correct.

Q: And what is your specialty?

A: Psychiatry. I'm board certified in psychiatry.

Q: And in 1981, were you employed as a staff psychiatrist at Napa State Hospital?

MR. GRAHAM: Objection, Your Honor. At this time I would object to Dr. Pranger testifying on the grounds she was not listed on the exhibit list. She was not mentioned in any answers to interrogatories. She did not testify at the State Personnel Board hearing. She's not been mentioned as a --

THE COURT: The objection is overruled. We're going forward with this testimony--

MR. GRAHAM: All right.

MR. HAMMERNESS: Thank you.

THE COURT: --and voire dire.

Q: (By Mr. Hammerness) The question was, ma'am: Were you employed at Napa State Hospital in 1981?
A: Yes.
Q: And in what capacity were you employed at that time?
A: For the Department of Professional Education.
Q: And what were your duties in the Department of Professional Education in 1981?
A: I met once a week with the residents in training with another psychiatrist at that time, Dr. Elizabeth Reynolds, and we had process support group for the residents in the program.
Q: Who was in charge of the residency program at Napa State Hospital at that point in time, ma'am?
A: Dr. Magno Ortega.
Q: At some point in time in August of 1981, did you go and see Dr. O'Connor about certain complaints of the residents against Dr. Ortega?

MR. GRAHAM: Objection, leading, Your Honor.

THE COURT: Objection's overruled.

You may answer.

THE WITNESS: Yes.

Q: (By Mr. Hammerness) And where did you see Dr. O'Connor, if you recall?
A: In his office in the Administration Building.
Q: And what did you relate to Dr. O'Connor at that time about the resident complaints?
A: We talked about residents' complaints about sexual harassment.
Q: Sexual harassment by whom?
A: By Dr. Ortega.
Q: Of the residents?
A: One of the residents in the group and one of the previous residents.

Q: And had those residents disclosed that sexual harassment during the course of your meetings with them as part of your duties?

MR. GRAHAM: Objection, hearsay.

THE COURT: Overruled.

THE WITNESS: The one resident disclosed that in the group process with me and Dr. Reynolds.

Q: (By Mr. Hammerness) And did you tell Dr. O'Connor that Dr. Reynolds herself had been harassed by Dr. Ortega?

A: Yes.

MR. GRAHAM: Objection, leading.

THE COURT: Objection's overruled. This is voir dire, Counsel. And also, the statements and whether or not they are true don't come in for that purpose. They come in for--

MR. HAMMERNESS: State of--

THE COURT: No. They come in, essentially, for notice.

MR. HAMMERNESS: Notice. Thank you, Your Honor.

Q: (By Mr. Hammerness) Incidentally, did you speak with Dr. Laskay, as well?

A: Yes.

Q: And why did you speak with Dr. Laskay?

A: They were asking all the residents and staff.

Q: About who?

A: About Dr. Ortega.

Q: So this took place during the administration's investigation of Dr. Ortega; is that correct?

A: Yes, that's correct.

Q: And did you tell Dr. Laskay the same information that you related to Dr. O'Connor in his office?

A: Yes.

MR. HAMMERNESS: Thank you, ma'am.

THE COURT: Mr. Graham?

CROSS-EXAMINATION BY MR. GRAHAM:

Q: Dr. Pranger, what are you doing now?

A: I didn't hear you.

Q: What are you doing now, employment-wise?

A: I'm a psychiatrist in private practice in Napa.

Q: Okay. How long--where did you go after left Napa State Hospital?

A: In private--I worked for the Department of Solano County for the Mental Health Services from '72 to '75. And also, at the same time, had to go in private practice in Napa.

Q: After 1981,have you ever worked with Dr. O'Connor, worked with him?

A: Not after he left the hospital.

Q: Okay. And now the program, you were in charge of some residential program. Tell us again what exactly this was, this--

A: I was the facilitator with another physician, Dr. Reynolds.

Q: Okay.

A: For group process for the psychiatric residents.

Q: and that was a process that was supposed to be confidential, correct?

A: Correct.

Q: And it was understood and promised by everybody involved that anything said in there would remain confidential; isn't that correct?

A: That was correct.

Q: Okay. And despite the promises of confidentiality, you went and told Dr. O'Connor something that arose in those meetings?

A: I didn't reveal names of the residents.

Q: You did or did not?

A: I did not reveal the name of the residents who had said that.

Q: Who was the resident who said that?

A: I do not know. I have forgotten the name now.
Q: Okay. It was some unknown person and I assume an unknown date. You don't know what date it allegedly occurred, either?
A: I know that we had the morning group process, Dr. Reynolds and I, with the residents. And that during that meeting the residents revealed her problems and that she was looking for another residency.
Q: And Dr. Reynolds, did she complain?
A: Yes.
Q: And did she--did you reveal to Dr. O'Connor that Dr. Reynolds had complained?
A: I don't remember what--I don't think I revealed her--I basically never told the names of people.
Q: You didn't tell them the names at all?
A: I don't believe so.
Q: When did you first remember that it was Dr. Reynolds that was involved?
A: Oh, I mean I worked with her and she had revealed to us and several other doctors what had happened. And I think that about the time that this hearing was set up with the state commissioner or what the title was, the gentleman was, who did the hearing at the state hospital, at that time Dr. Reynolds came forward.
Q: Now--
A: And the librarian who--
Q: Excuse me. Dr. Reynolds said that Dr. Ortega had stroked her hair 10 years before 1981; is that correct? Is that how you recall it?
A: Yes.
Q: All right. That was the sexual harassment she was complaining of; isn't that correct?

A: Well, it was much more. He had also said that she was very special and that she needed to leave her husband.
Q: This occurred 10 years before 1981, correct?
A: Correct.
Q: Okay. How do you remember when talked to Dr. O'Connor?
A: I know that it was at the time of the investigation.
Q: And was it after Dr. Ortega's locks had already been changed on his office?
A: I wouldn't know.
Q: Okay. How do you recall it was even August rather than September?
A: It was in that period of time.
Q: Okay. You're unable to say whether it was late July, early August, late August or early September, correct?
A: Correct.
Q: Okay. But it was after Laskay had already been appointed; is that correct?
A: I believe so.
Q: And did Laskay--excuse me. Did Laskay talk to you about any of the materials that he had found in Dr. Ortega's office?
A: No.
Q: Okay. And, specifically, what did you tell Dr. O'Connor?
A: Well, what I just told you that Dr. Reynolds had had problems and that this resident in the group had told us that on Saturday morning Dr. Ortego had shown up at her house.
Q: When you met with Dr. O'Connor, who set up the meeting?
Did he contact you?
A: Most likely.

Q: Right. And Dr. O'Connor said he would like to know whether there were any allegations of sexual harassment; is that correct?
A: Yes.
Q: Okay. So Dr. O'Connor brought the subject up; is that correct?
A: I would think so.
Q: Yes, I think so.

MR. GRAHAM: That's all I have.

MR. HAMMERNESS: I have nothing further, Your Honor.

THE COURT: Now, you recall this as being in 1981?

THE WITNESS: Yes, around that time frame.

THE COURT: Can you pinpoint the year for certain?

THE WITNESS: No. I mean, it's a long time ago, but I know it was at the time that the whole investigation was going on, and I remember that that was in 1981.

THE COURT: Okay.

THE WITNESS: And after that, there wasn't much ever after that was talked about. It was just that period.

THE COURT: Okay. And you recall with any greater specificity than what you've already testified to what month or months this was?

THE WITNESS: No, just March. Not with more specificity.

THE COURT: And you first talked to Dr. O'Connor?

THE WITNESS: It was not very far apart, the time that I talked to Dr. Laskay and Dr. O'Connor.

THE COURT: You talked to Dr. O'Connor first before you talked to Dr. Laskay?

THE WITNESS: As far as I remember, yes.

THE COURT: You don't recall going in to Dr. O'Connor or calling him up or something and saying, "Dr. O'Connor,there's some information I think you ought to know," and proceeded to tell him about it, or words to that effect?

THE WITNESS: I don't believe so.

THE COURT: How about Dr. Laskay? Did you call him or did he call you?

THE WITNESS: He called me. I mean, it was at the time.

THE COURT: And did he call you to make the same inquiry?

THE WITNESS: It was essentially the same inquiry, yes.

THE COURT: Did he ask you about any other--did either Dr. O'Connor or Dr. Laskay ask you about anything else regarding Dr. Ortega's conduct besides the sexual harassment issue?

THE WITNESS: There probably were some other things, but without refreshing my memory, I don't know.

THE COURT: It's only the sexual harassment issue that stands out in your mind?

THE WITNESS: Yes.

THE COURT: And--

THE WITNESS: But the only problem was at that time it wasn't really labeled as much as sexual harassment. You know the difficulty that many of the women had, the advice was: "How can you deal with it?" And: "Can you find another place?"

It wasn't labeled as something at that time, see?

THE COURT: They were not words, though, that would confuse you in terms of thinking something else. They're words that would translate into--readily translate into sexual harassment?

THE WITNESS: It would translate nowadays into sexual harassment.

THE COURT: So there was no question in your mind what was meant by it?

THE WITNESS: Oh, no. No.

THE COURT: Okay. Did you, in fact, use the name Dr. Reynolds with Dr. O'Connor?

THE WITNESS: No, I didn't.

THE COURT: So how do you know who might have made a complaint about harassment?

THE WITNESS: Well, Dr. Reynolds had volunteered to testify at the hearings at the state hospital. And at that time she revealed to me and several other doctors of the group that we met.

THE COURT: Now, had she mentioned--had Dr. Reynolds mentioned this to you before she actually testified?

THE WITNESS: No. It was about the same time that it came up. Whether that was a month earlier, month later, it was all in that time frame.

THE COURT: And when did she indicate to you that this harassment had occurred?

THE WITNESS: At that time that was the first time that she--

THE COURT: No, but when did she say the actual acts, Dr. Ortega's conduct, had occurred?

THE WITNESS: That was fairly shortly after she entered the residency program.

THE COURT: Which would have been approximately when?

THE WITNESS: Which was probably around--I mean, I finished there in 1972, residency program. And she was a resident probably two years after me, after I was there.

THE COURT: So around 1973?

THE WITNESS: Probably. Or she might have been already in the residency my last year.

THE COURT: Did she indicate how long this conduct went on for?

THE WITNESS: I know that from what I remember was that it went on in the first year that she was there. And that she felt very anxious about it and what to do about it. I know that one of her supervisors, I believe, advised her to look for another residency. That's what I remember her telling me.

But she couldn't easily move, and then she became pregnant during the residency. And then, it became even harder for her to move.

THE COURT: And did she indicate that that conduct that she was complaining about occurred beyond the year or so after she started?

THE WITNESS: I don't remember.

THE COURT: You think it was pretty much just that one year or so?

THE WITNESS: I think that most mostly that she--from what I understand--tried to stay out of the way.

THE COURT: Did somebody else also tell you direct that they had been subject to sexual harassment by Dr. Ortega?

THE WITNESS: Well, the resident who was in the group told us directly.

THE COURT: And do you know who that was?

THE WITNESS: No, I don't remember her name anymore.

THE COURT: And that had happened to her when?

THE WITNESS: It had happened to her shortly before she was telling us in group that she was looking for where to move to, to another residency.

THE COURT: So that would have been closer to 1981?

THE WITNESS: Yes.

THE COURT: And she was the one who herself had ben the victim of this conduct?

THE WITNESS: Yes.

THE COURT: And did you mention that to Dr. Ortega, as well?

THE WITNESS: Yes.

THE COURT: I mean, to Dr. O'Connor?

THE WITNESS: To Dr. O'Connor, which at that time I knew, but not now.

THE COURT: And when you talked to Dr. O'Connor, did you give him any details of what these people had actually said had happened?

THE WITNESS: No. There were not a great deal of details. It wasn't that clear of an issue, as I say, in those days.

THE COURT: So you just told him generally that they had some problems?

THE WITNESS: Right.

THE COURT: And how about Dr. Laskay? Did you give him any details?

THE WITNESS: About the same.

THE COURT: And what was Dr. Laskay's position at the time that you talked with him?

THE WITNESS: I know he had an office down the hallway from where the professional education offices were, but what his position was, I don't recall.

THE COURT: Okay. Anything further?

MR. GRAHAM: No, Your Honor.

MR. HAMMERNESS: No, Your Honor.

THE COURT: Thank you very much. You may step down. But do not discuss your testimony with any other persons who may be witnesses until this trial is over, okay?

Thank you very much.

THE WITNESS: Thank you.

(Whereupon, Dr. Pranger's testimony was concluded.)

CERTIFICATE OF REPORTER

I, Katherine Pope Wyatt, Court Reporter, hereby certify that the foregoing transcript, pages numbered 1 through 18, constitutes a true, full and correct transcript of my shorthand notes taken as such court reporter to the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

Katherine Pope Wyatt

3-21-96
Date

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, Plaintiff,	)	EXCERPT
vs.	)	No. C-82-4045-MHP
	)	MONDAY
DENNIS M.	)	MARCH 11, 1996
O'CONNOR, ET AL.,	)	9:00 o'clock a.m.
Defendants.	)	San Francisco, California
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff: Gilbert T. Graham, Esq.
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For The Defendant: State of California
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(415) 356-6373
BY: Paul T. Hammerness,
Deputy Attorney General

Reported By: Katherine Pope Wyatt, CSR NO. 9866

MARCH 11, 1996 9:00 O'CLOCK A.M.

PROCEEDINGS

THE COURT: Yes.

MR. HAMMERNESS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HAMMERNESS: Should I proceed with my witness?

THE COURT: Yes, you may certainly do so.

MR. HAMMERNESS: Yes, Your Honor. The Defendants call Dr. Michael O'Connor.

THE CLERK: Please raise your right hand.

(Thereupon, the witness was sworn.)

THE CLERK: Please take the stand. Please state your full name and spell your last name for the Court.

DR. O'CONNOR: My name is Dennis Michael O'Connor. The last name is spelled O apostrophe C-o-n-n-o-r. Thereupon --

DR. DENNIS MICHAEL O'CONNOR

was called as a witness on behalf of the Defense, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. HAMMERNESS:

Q. Dr. O'Connor, what was your position in July of 1981?

A. I was executive director of Napa State Hospital.

Q. And as the executive director, just generally, were you in charge of the entire administration of the state hospital?

A. Yes, I was.

Q. And did that include responsibility for hiring, firing and disciplining employees?

A. Yes, it did.

Q. And was Dr. Ortega one of your employees at the hospital in July of 1981?
A. Yes, he was.
Q. And would you tell me what it was that he -- what position he held in July of 1981?
A. He was the chief of the Professional Education Department.
Q. And as chief of the Professional Education Department, to whom did he report in the chain of command at the hospital?
A. He reported directly to me.
Q. At the end of July of 1981, did you initiate an investigation of Dr. Ortega's administration of the Department of Professional Education at Napa State?
A. Yes, I did.
Q. And how long did that investigation last?
A. The investigation lasted approximately four weeks.
Q. From when until when, if you recall?
A. It started either -- it started the first working day in August, which I believe was August 3rd and was wrapped up on August the 27th or 28th.
Q. And I take it you yourself had some -- an investigative team appointed to perform the investigation of the department; is that true?
A. That's correct.
Q. And who were the persons who performed the investigation?
A. I principally had three individuals that performed it. They were Mr. James Arnold, who worked for Mr. Friday as an administrative resident. There was a Dr. Tom Laskay, who worked directed for me as our Office of Program Review Medical Consultant. And there was Mr. James Stratton, who was a member of our hospital peace officers. He was the investigator in our hospital police force.

MR. GRAHAM: Excuse me, Your Honor. It appears Dr. O'Connor is referring to notes when he's testifying. I think if he does so, he should let it be reflected on the record.

THE COURT: Okay. Whatever that paper was is now turned over. He's turned it over.

MR. HAMMERNESS: Yes. I asked him to take the paper up.

THE WITNESS: I don't need it.

MR. HAMMERNESS: Okay.

THE COURT: Now, you mentioned another name in connection with Mr. Arnold. Was that person also involved in the investigation?

THE WITNESS: Your Honor, I mentioned Mr. Friday.

THE COURT: That's right. Mr. Friday. I knew I had heard his name here before, yes.

THE WITNESS: Mr. Friday was the hospital administrator. In those days, the hospital was managed -- the executive director was the chief executive officer, which was me. Then, the hospital was divided on two sides. On one side of it was the administration of the hospital and the hospital administrator, Mr. Friday, had that position.

On the other side was the clinical management of the facility, and that was Dr. Donoviel. He was responsible for all the clinical aspects. We were the three top officials, and they both reported to me. So for a sense, this essentially was not a clinical investigation. It had to do with management and administration.

I asked Mr. Friday to provide me with one of his people, and he chose Mr. Arnold who worked directly for him. Also, since this involved three individuals that were fairly high up as far as their responsibilities in the hospital, I did ask him to

coordinate the overall investigation because it involved three separate individuals that worked in three separate areas: One a police officer; one is a medical consultant; and the other as an administrator.

So he -- although he wasn't involved directly in the investigation itself, he was to coordinate it with and keep things together as they came to me.

THE COURT: "He" being Mr. Friday?

THE WITNESS: Yes.

THE COURT: Okay. Thank you. Excuse me.

MR. HAMMERNESS: Yes.

Q. (By Mr. Hammerness) And at the end of that investigation, did you receive a preliminary report from the investigative team which detailed what steps they undertook as part of their investigation of the department at the hospital?

A. Yes, I did.

Q. And is Exhibit J, the document in front of you, this preliminary report?

A. I believe it's Exhibit I.

Q. I'm sorry. Exhibit I. Yes, is that the report?

A. Yes, it is.

Q. And was that furnished to you on or about August 27th, the bulk of it, and then the fact page on August 28th?

A. Yes, the bulk of it was presented to me on August 27th, and then the next day the addendum was attached to it, which was the 28th of August, 1981.

* * * * * * * * * *

THE COURT: And if there are any other besides what you've referred to in the motion, the deposition of Dr. O'Connor any other deposition extracts, such as related to Dr. Laskay or any others that you wanted me to look at, you should identify for me and make sure I, you know, have them.

You can leave a list with Ms. Moriyama or you can leave a list but you should do that before you go today, one of my law clerks back in chambers, because I'm going to be staying out on the bench today.

MR. GRAHAM: We should what, Your Honor? Depositions?

THE COURT: Well, the deposition I want, what you've been referring to. But if there's anything else that you want me to look at in this context, you may do so. And I don't know whether there's anything in Dr. Laskay's deposition or any other depositions.

MR. HAMMERNESS: Yes, Your Honor. And Dr. Lasay's testimony, which was in testimony before the Personnel Board when he was being cross-examined by Dr. Ortega. There is the testimony at Bates-stamped pages 135 through 137, which I have already passed back to the Court.

THE COURT: All right. Okay. Those are -- those are exhibits that we have.

MR. HAMMERNESS: Well, it was Plaintiff's exhibit.

THE COURT: Okay.

MR. GRAHAM: I think pages six through eight of the deposition.

I do have some objections to it. It's a very short part. I don't know if you just wanted to have me read it into the record. Can I just place my objections now to the deposition testimony?

THE COURT: Well, we'll take them up tomorrow morning, because I've got another calendar.

I will tell you this: Unless I see something different in Dr. Laskay's deposition or if there's anything that we can pre-review of Mr. Friday and Mr. Stratton, I believe that without even getting to the questions of fact that assuming, you know, or taking all

of Dr. O'Connor's testimony as true, and unless there is something inconsistent with that testimony in Dr. Laskay's deposition or in any other evidence that we have, that a search based upon claims of sexual harassment, I think, falls short of even the reasonableness standard.

Dr. O'Connor might be well-advised not to use the term "probable cause" since the Supreme Court rejected that tougher standard. But there are some problems with it, number one, some of which the evidence relied upon is clearly very stale, by any reasonableness standards, and well-beyond anything, totally beyond anything by a number of years. He's been a law enforcement officer, for example.

In addition, unless there is something in this preliminary report or anything else we have from any of the people who conducted the investigation to indicate that they had made an effort to develop more fully the bases for the sexual harassment claim, that it is unreasonable as a matter of law to go in and inspect someone's office merely upon a statement of one person whose evidence is stale and generalized claims of the nature that we heard from Dr. Pranger.

And it appears that that's all that they may have had, unless there's something different from the investigators. When you take that together with the question of the scope of the search, I think that that raises, you know, even a higher degree of problems with the reasonableness of the search.

Insofar as it relates to sexual harassment, I stand second to none in my concerns about sexual harassment and investigating those and making sure that people with complaints are properly heard, and that if, in fact, sexual harassment has been, you know, engaged in, that the harasser be appropriately dealt with and punished.

Nonetheless, there are due process issues in all of that, and I think that in using a reasonableness standard for somebody who is in the position of Dr. O'Connor, it is unlikely, absent additional evidence, which doesn't appear that they had at the time that one would find much, if anything, in the way of evidence in searching the alleged harasser's office. People don't generally maintain files on sexual harassment and people they have harassed if, in fact, that's what they are doing.

The kinds of things that have been referred to can be as consistent with innocent conduct or consensual conduct as it could be with harassing conduct. And perhaps Dr. O'Connor needs to understand what, in fact, constitutes sexual harassment for the purpose of following a basis for some action on the grounds of sexual harassment.

That's not to say that I don't subscribe to the same notion you shouldn't, at least as they say, get your butter where you get your bread. That, in particular, where the person who is in a position of essentially buttering the bread is also the person who's supervising you. That such persons have to be very, very aware of their authority and power, and particularly in that day and age, and abuses of that. And it may be appropriate to sanction them as well.

But what is sufficient to give rise to go in and do a search of an employee's office is another matter. And it does not sound to me, based upon what I've heard so far, that the kind of investigative leads and other action to be taken to conduct an investigation before getting to the point of actually searching someone's office for that reason had been developed at the point where the search was conducted.

And that, certainly, I don't think there's any question that the other reasons that were asserted or

have been asserted have been asserted all along and whether or not, you know, those were reasonable and whether or not the conduct that -- or the search was justified is something that's going to be for the jury in this case.

But it's my conclusion that even taking all of the facts in a light most favorable to Defendants, that could not say that a person in Dr. O'Connor's position or the other persons who conducted the search -- actually conducted the search -- could have reasonably acted or had reasonable cause at that point given the Supreme Court's standards both before and as ultimately articulated in this case.

And, therefore, I will not let the issues of sexual harassment get in before the jury. Now, I know there are always issues about when you get in there if you have a legitimate basis for a search what else you may also seize that's in plain view and so forth.

But the contention to this point in connection with this part of the hearing has been that that was also one of the reasons for the search. And what I'm saying by this ruling is that, in fact, there is no -- there is not sufficient evidence which jurors, even given the instruction about what constitutes "reasonable," could find that the search was reasonable without essentially violating the instructions.

And so the issue of sexual harassment is not to go before the jury as a reason for the search.

Now, I have not thought about what you do about the items that were seized and the whole issue of the scope of the search and whether it went beyond that by virtue of seizing those items. And maybe, so we don't have to get into that, you could work out some sort of a stipulation that "X" items were seized, and it is admitted or not relevant to the other grounds for the search that are being proffered, namely the

computer, the other records and so forth have been alleged by Defendant.

Okay? I don't know if you can work that out or not, but I need to go to the next part of the calendar. And if there's anything in any of the depositions or other evidence that you would submit, Mr. Hammerness, that go beyond, you know, what we heard today or additional evidence that Dr. O'Connor did not testify to because it wasn't in his knowledge, then you may give them to me and I'll take another look at them. Okay?

MR. HAMMERNESS: Okay. The only additional thing would be the deposition testimony of Dr. -- I'm sorry -- Richard Friday. And I flagged the page at page 19.

THE COURT: Okay, fine.

MR. HAMMERNESS: Where he says that sexual harassment was part of the investigation.

THE COURT: Okay, fine.

MR. HAMMERNESS: But as I understand Your Honor's ruling, just so I'm clear, you're not going to allow us to put on any evidence about the complaints of sexual harassment.

THE COURT: That's right.

MR. HAMMERNESS: Okay.

THE COURT: Unless -- unless there's something in there that, you know, or anything else you submit that I look at between now and whenever we, you know, can get a ruling we can go forward with a ruling on it and hear both sides out. Until that time, that's correct.

MR. HAMMERNESS: Okay.

THE COURT: So see what you can work out, maybe on a stipulation as to those -- what is it -- three items or whatever?

MR. GRAHAM: Now, those three items, those relate to the items seized?

THE COURT: Right. The poems and the photo. Was it a letter or something?

MR. HAMMERNESS: It was a photograph.

MR. GRAHAM: We'll actually be offering them, so we don't have any objection to them going into evidence.

MR. HAMMERNESS: Well, of course, I mean, I think that's the whole problem. And perhaps the Court is foreseeing it, is if we don't get into the complaints of sexual harassment, then what is the relevance of those items? And, in fact, I think you're directing a verdict in the Plaintiff's favor. So why don't we -- if you want to do that, then we can just work out the damages. And that really would make the trial short.

THE COURT: No, I have to leave something for the jury to decide. What if you do a stipulation? A stipulation something along the lines of: "It's stipulated that these items are beyond the scope of the search that you have heard testimony about. And the only question with respect to those three items is how reasonable or was it reasonable for them to seize them?

And I don't know what the facts are going to show with respect to that. And if you find that it was not reasonable, then, you know, what damages did Dr. Ortega suffer as a result of that? You may have to, you know, do it in the form of an interrogatory.

I'm trying to keep it as clean as possible without getting it too mucked up, okay?

MR. HAMMERNESS: Right.

THE COURT: So see what you can work out and leave the other documents. We're probably -- because we're going to be in here -- just as well take

them back to chambers and leave them with one of the law clerks.

Why don't you gather up together what you have and whatever else you wanted me to look at and get it back to my law clerk this afternoon in one -- all of it in one batch instead of trotting back and forth, okay?

MR. GRAHAM: Just one word so I don't have to raise it. In regard to Laskay's deposition, there's no foundation. You can't tell when this particular investigation occurred; is that correct?

THE COURT: I'll look at it and see what it says, okay? If I have any questions, before I change the ruling, I'll take a look at them.

MR. HAMMERNESS: And should I give these to Lurline or --

THE COURT: Why don't you all, both of you, talk about what I need to have in order to flesh out the rest of this?

MR. HAMMERNESS: Sure.

THE COURT: And then, deliver them back to chambers. You can just buzz out here at that door and she'll tell them who you are.

(Whereupon, trial was continued to Tuesday, March 12, 1996, at 8:30 o'clock a.m.

CERTIFICATE OF REPORTER

I, Katherine Pope Wyatt, Court Reporter, hereby certify that the foregoing transcript, pages numbered 1 through 16, constitute a true, full and correct transcript of my shorthand notes taken as such court reporter to the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

_____ _____

Katherine Pope Wyatt Date

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MAGNO J. ORTEGA, Plaintiff,	)	EXCERPT
vs.	)	No. C-82-4045-MHP
	)	WEDNESDAY
DENNIS M.	)	MARCH 13, 1996
O'CONNOR, ET AL.,	)	8:30 o'clock a.m.
Defendants.	)	San Francisco, California
_____	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff: Gilbert T. Graham, Esq.
22 Second Street
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For The Defendant: State of California
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BY: Paul T. Hammerness,
Deputy Attorney General

Reported By: Katherine Pope Wyatt, CSR NO. 9866

March 13, 1996 8:30 O'CLOCK A.M.

PROCEEDINGS

(Proceedings at end of day after jury had been excused for the day.)

THE CLERK: You may be seated.

THE COURT: Counsel, if there is anything we need to take care of that can be taken care of in about three minutes we will do that, because I have a calendar this afternoon, and I see its'--

MR. GRAHAM: Very, very briefly, Your Honor

THE COURT: --somewhat more messy than I thought, so--

MR. GRAHAM: Real briefly.

THE COURT: Yes.

MR. GRAHAM: Just to clarify the matter yesterday on the three exhibits, briefly, my idea on it was that I filed in limine motions to keep out sexual harassment which was granted.

THE COURT: Right.

MR. GRAHAM: The Court said--

THE COURT: In the liability phase.

MR. GRAHAM: In the liability--

THE COURT: Well, no. Excuse me. That's correct, period. Yes. Excuse me. Thinking of something else. Sorry.

MR. GRAHAM: Right. And then, the matter came up without a motion about excluding the exhibits from Dr. Sutton, namely the Valentine, the picture and the book of poems, and any reference to them, which we have not done.

THE COURT: Um-hum.

MR. GRAHAM: Nevertheless, it seems like that deprives us of evidence that we shouldn't be deprived of.

There was no in limine motion by Defendant, and it doesn't seem like it logically follows that those would be excluded. It seems to me the in limine motion--

THE COURT: I didn't exclude them. Did you miss something? I said they would be admitted into evidence, but that we're not going to hear any reference to sexual harassment as a basis for obtaining them.

That essentially what I would instruct the jury is that the Court has found that those, the seizure of those items, you know, I'm telling you given--et cetera, is not for the jury. We'll have to frame it properly for the jury--given my ruling regarding sexual harassment.

But that they will come in, you know, essentially solely on the issue of--well, I've already made a finding that it's not reasonable to seize them.

They may come into evidence, but because the Court has already found it not reasonable to have seized them, then the only question with respect to them is, you know, what damages is he entitled to?

MR. HAMMERNESS: But they are not coming into evidence during this phase of the case, as I understand it. Because, you know, I mean, then, I think as a matter of fairness or in the alternative, you know, I guess I can make a motion for mistrial.

I think that would be them opening the door to whatever justification there was, albeit the Court has ruled that it is unreasonable for seizing the item.

THE COURT: Well--

MR. HAMMERNESS: And it just seems to me, you know--

MR. GRAHAM: Well, I've heard Mr. Hammerness argue this.

MR. HAMMERNESS: --unfair. Well, you're the one who filed the motion in limine, too.

MR. GRAHAM: Well, I'm not objecting to that. It just seems to me that you'd exclude one of the grounds. All it means is that they can still argue the other grounds, the computer and coercion of residents.

THE COURT: Right.

MR. GRAHAM: And the question will be whether all of the evidence that was recovered, whether that was unreasonable under these justifications.

THE COURT: Well, I've already made a ruling as a matter of law that those three items are not reasonable.

MR. HAMMERNESS: Right.

THE COURT: Now, I suppose what happens is if the jury then finds that the search issues as given to them, the search and the scope were reasonable, then that may take care of part of that.

They would still have to then, nonetheless, hear that these other items were seized. The Court has found that it was not reasonable to seize those as a matter of law, and it's up to you to decide what damages Plaintiff is entitled to by reason of that seizure.

And you may consider all of the facts before you in deciding what damages he's entitled to.

MR. GRAHAM: It's just that I prefer to have those, that evidence to show how unreasonable the search was under the alleged justifications. That is my problem.

THE COURT: But I just said: Well, it is unreasonable, period.

MR. HAMMERNESS: Well, what he wants to do, of course, is to present that jury to--that evidence to this jury.

THE COURT: No.

MR. HAMMERNESS: And poison their finding on the other items. That's what he wants to do.

THE COURT: It distorts it, because the reason, the reason, ostensible reason for taking those documents is the one I'm keeping out.

MR. HAMMERNESS: Right.

THE COURT: And keep that out, and then you really shouldn't be permitted to admit those in during the liability phase.

MR. GRAHAM: Okay.

THE COURT: Okay?

MR. GRAHAM: All right. Thank you, Your Honor.

THE COURT: Okay.

MR. HAMMERNESS: Thank you.

THE COURT: Because I've already found they are unreasonable. Clearly, they would be unreasonable, you know, given the other reasons for the search. Okay?

MR. GRAHAM: Okay.

THE COURT: Okay. Thank you.

MR. GRAHAM: Thank you.

MR. HAMMERNESS: Thank you, Your Honor. And tomorrow at?

THE COURT: 8:30. I don't know what I was thinking when I said "9:30." Wishful thinking or something. I was thinking all the things I got to get done here and so--okay. Thank you.

MR. HAMMERNESS: Oh, yes. We were going to go over the--this is off the record.

(Whereupon, this trial was continued to Thursday, March 14, 1996 at 8:30 a.m.)

CERTIFICATE OF REPORTER

I, Katherine Pope Wyatt, Court Reporter, hereby certify that the foregoing transcript, pages numbered 1 through 7, constitutes a true, full and correct transcript of my shorthand notes taken as such court reporter to the proceedings hereinbefore entitled and reduced to typewriting to the best of my ability.

Katherine Pope Wyatt	3-15-96 Date

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAGNO J. ORTEGA,	)	
	)	
Plaintiff-Appellant,	)	No. 93-15813
v.	)	
	)	D.C. No.
DENNIS M.	)	CV-82-04045-JPV
O'CONNOR, Director	)	
Napa State Hospital;	)	OPINION
DOROTHY OWEN,	)	
and RICHARD	)	
FRIDAY,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
November 17, 1994-San Francisco, California

Filed March 24, 1995

Before: Donald P. Lay,* Harry Pregerson,
and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

*The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Gilbert T. Graham, San Francisco, California, for the plaintiff-appellant.

Paul T. Hammerness, Deputy Attorney General, San Francisco, California, for the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the district court properly barred testimony of witnesses as a sanction for failure to serve a witness list on opposing counsel.

I.

In July 1982, Dr. Ortega filed suit in the district court against Dr. Dennis O'Connor, Executive Director of the Napa State Hospital, and various other Hospital employees (collectively "Dr. O'Connor"), alleging that the search of his office by such employees violated the Fourth Amendment. The district court ruled against Ortega on summary judgment. *Ortega v. O'Connor,* No. C82-4045 (N.D. Cal. May 30, 1984) ("*Ortega I*"). This court reversed the district court. *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985) ("*Ortega II*"). The Supreme Court then granted certiorari and, in a plurality opinion, reversed this court and remanded the case to "determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope." *O'Connor v. Ortega*, 480 U.S. 709, 729 (1987) ("*Ortega III*"). We in turn remanded for trial in an unpublished order.

At Trial, the court excluded Dr. Ortega's witnesses as a sanction for what it perceived was Dr. Ortega's failure to comply with a pretrial order. On the basis of the evidence presented, the court granted Dr. O'Connor's motion for a directed verdict from which Dr. Ortega appeals.

II.

The pretrial order, issued pursuant to Rule 235-7 of the Local Rules of Practice for the United States District Court for the Northern District of California, directed the parties to file pretrial witness lists. Although Dr. Ortega did file his pretrial witness list with the district court, the court found "nothing indicating [that the witness list] was served on opposing counsel" in the court file. At trial, opposing counsel claimed that he had never received Dr. Ortega's witness list. Reasoning that Dr. Ortega, by failing to serve his witness list on opposing counsel, had not complied with the pretrial order, the court sanctioned Dr. Ortega by excluding the listed witnesses.

[1] There is not dispute that, in a proper case, a trial court may exclude a party's witnesses as a sanction for failure to comply with a pretrial order. *See* Fed. R. Civ. P. 16(f); *Ackley v. Western Conf. of Teamsters,* 958 F.2d 1463, 1471 (9th Cir. 1992); *United States v. Valencia,* 656 F.2d 412, 415 (9th Cir.) ("The appropriate sanction for a failure to comply with a discovery rule should rest in the district judge's sound discretion."), *cert. denied,* 454 U.S. 877 (1981). Here, however, no lack of compliance has been demonstrated. The district court record contains a copy of a declaration of service by mail of Dr. Ortega's list of witnesses on Mr. Hammerness, counsel for Dr. O'Connor. This declaration is affixed to a letter

regarding subpoenas, signed by Dr. Ortega and addressed to Mr. Hammerness; that letter, which at one point refers to the "enclosed copy of witness list," bears a district court stamp "received, Nov. 9, 1992." Further, the letter to which the declaration is affixed was entered in the district court docket. The court appears to have overlooked this evidence of Dr. Ortega's compliance.

[2] Dr. Ortega's compliance is not negated by the fact that opposing counsel failed to receive the list. In directing service, Local Rule 229-2 provides that "[a]ll discovery materials shall be served pursuant to Rule 5 of the Federal Rules of Civil Procedure." Rule 5(b), "Service: How Made," states that "[s]ervice upon the attorney. . . shall be made by delivering a copy to the attorney. . . or by *mailing it to the attorney*. . ." (emphasis added). Dr. Ortega's declaration of service by mail is sufficient; thus, Dr. Ortega complied with the requirements of Local Rule 235-7.[16] Under the circumstances, it was error to sanction Dr. Ortega for failure to comply.

[3] Judicial error alone is insufficient to mandate reversal, however; "[t]o reverse, we must say that more probably than not, the error tainted the verdict."[17]

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16. Dr. Ortega's compliance with Rule 235-7 was not exact, however, Dr. Ortega did not file his list of witnesses until November 4, 1992, although he had been directed to do so 30 days prior to trial, i.e., by October 30, 1992. Since defense counsel also served its list of witnesses after the designated date, the delay would not constitute grounds for exclusion.

17. The Ninth Circuit has formulated two different tests for prejudice in civil cases. As note, in *Kisor*, this court stated that a reviewing court should find prejudice only if it concludes that, more

Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1340 (9th Cir. 1986). Here, over twenty witnesses were prohibited from testifying; Dr. Ortega was limited to calling defendants, who had been included in the witness list of opposing counsel, to make his case. Ultimately, in presenting his case-in-chief, Dr. Ortega could do little more than rely on cross-examination. We do not doubt that this prejudiced Dr. Ortega; we reverse and remand for a new trial.[18]

III.

Although we agree that remand is necessary, we reject Dr. Ortega's claim that the district court erred in refusing to reinstate Asher Rubin as a defendant in the instant case. Rubin was included as a defendant *Ortega I* in Dr. Ortega's original lawsuit; the district court in that suit dismissed Rubin on the grounds of prosecutorial immunity. Dr. Ortega now argues that this court's reversal of *Ortega I* extends to all issues

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probably than not, the lower court's error tainted the verdict. In contrast, under the rule articulated by this court in *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983), the reviewing court must find prejudice unless it concludes that, more probably than not, the result in the lower court was untainted by error. Thus, in a close case, where the reviewing court is uncertain of the effect of an evidentiary error on the jury's verdict, these two standards create contradictory presumptions. Here, however, we are persuaded that the exclusion of all of Dr. Ortega's witnesses would constitute prejudice under either test.

18. In addition to his evidentiary challenge, Dr. Ortega raises a subsidiary claim of judicial bias. "To demonstrate that the trial judge was biased, [a party] must show that the judge's conduct reflected a disposition, based on extrajudicial sources, to treat him unfairly." *Hansen v. Commissioner*, 820 F.2d 1464, 1467 (9th Cir. 1987). Dr. Ortega present no such evidence.

decided by the district court; consequently, Dr. Ortega concludes, the order In *Ortega I* dismissing Rubin as a defendant has been reversed, and Rubin must be included in the instant action.

[4] "[A] judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided." *Hansen & Rowland v. C.F. Lytle Co.,* 167 F.2d 998, 998-99 (9th Cir. 1948). Thus, or reversal of *Ortega I* extends only to the Fourth Amendment issues expressly addressed; as there was no mention of Rubin by this court or any other, the district court's dismissal of Rubin in *Ortega I* stands.

Dr. Ortega may not now challenge the district court's dismissal of Rubin. Dr. Ortega appealed *Ortega I* to this court and then to the Supreme Court. If Dr. Ortega wished to challenge the district court's dismissal of Rubin, he should have done so at the time of his original appeal. *See, e.g., Walnut Properties, Inc. v. Whittier,* 861 F.2d 1102, 1106 (9th Cir. 1988) party's failure to challenge district court's resolution on issue of abstention in prior two appeals precluded party's request for abstention on third appeal), *cert. denied,* 490 U.S. 1006 (1989). The district court's dismissal of Mr. Rubin is affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party to bear its own costs.

(3)

95-1747

Supreme Court, U.S.
FILED
MAY 22 1996
CLERK

No._____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1996

In Re DENNIS M. O'CONNOR, M.D.,
RICHARD FRIDAY, *Petitioners*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA.
HONORABLE MARILYN HALL
PATEL, JUDGE, *Respondent*

MAGNO J. ORTEGA, M.D.,
Real Party in Interest

Petition from Orders and Judgment of the United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge Presiding

BRIEF AND DECLARATION IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

by MAGNO J. ORTEGA, M.D.,
Real Party in Interest
1239 Thompson Ave.
Napa, CA 94558
(707) 255-6726

20 pp

QUESTIONS CONTESTED / PRESENTED IN PETITION

1. Whether the Honorable Patel, District Court Judge. disobeyed the prior mandate of this Court in O"Connor v. Ortega, 480 US 709 (1987) by denying petitioners' summary judgment motion, directing a verdict against petitioners on liability (for seizing personal correspondence), and stripping petitioners of their (subjective) qualified immunity defense.

2. Whether this Court should exercise its supervisory jurisdiction to issue a writ of mandamus and/or prohibition vacating the respondent district court's orders, and compelling it to enter judgment in petitioners' favor, as was done in the first trial (seven years) following Court's remand (in a directed vardict that, after only the interested parties listed in petition were wrongly allowed to testify, was immediately reversed).

LIST OF PARTIES

Petitioners: Dennis Michael O'Connor, M.D.
and Richard Friday

Respondent: United States District Court for
the Northern District of California,
Honorable Marilyn Hall Patel, Judge

Real Party in Interest: Magno J. Ortega, M.D.
1239 Thompson Ave.
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(707) 255-6726

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IN THE SUPREME COURT
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UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
HONORABLE MARILYN HALL PATEL, Respondent

MAGNO J. ORTEGA, M.D., Real Party in Interest

Petition from Orders and Judgment of the United States
District Court for the Northern District of California,
Honorable Marilyn Hall Patel, Presiding

BRIEF AND DECLARATION IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PRAYER

Real Party in Interest prays for the Court to dismiss this petition. Honorable Judge Patel had not disobeyed the Court.

OPINIONS BELOW (as submitted in petition)
JURISDICTIONAL GROUNDS and
CONSTITUTIONAL and STATUTORY
PROVISIONS (as stated in petition)

FURTHER STATEMENT OF THE CASE, FIRST JURY TRIAL

Though *Harlow v. Fitzgerald*, 457 US 800 (1982) was not yet established law at the time O'Connor ordered the search, it was already available when O'Connor v. Ortega was argued in the Supreme Court, and had been used by Ortega (then the named respondent) to re-establish liability by O'Connor, *et al*.

Reflecting already established practice, *Harlow* held that whether an official protected by qualified immunity may be held personally responsible for an allegedly unlawful official action generally turns on the **objective** "legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken.

Following remand as stated in petition, and numerous delays, the first jury trial was indefinitely postponed by phone late in the day just before it was scheduled to start, and after all witnesses had obtained time off from work. Held years later, it was adjourned with a directed verdict after no one but the petitioners (Dr. O'Connor and Mr. Friday) and Dr. Ortega have been allowed to testify. That verdict was reversed as was the first summary judgment by the same judge. He had died by then and the case was remanded for jury trial to another judge.

The sole justification testified to by Mr. Friday for the search, before a directed verdict was issued in the first jury trial, was simply to save the state $1,800 worth of allocated

and approved but unspent computer consultant funds for graduating residents in their fourth year of training.

The contract for it had been withheld. It surfaced belatedly during a poorly conducted cross-examination of Ortega by deputy attorney general and state counsel Rubin before Ortega could call on any witness or himself to testify on his behalf.

(Mr. Rubin was not adequately prepared nor expecting to proceed and had just rested his case for the state when the hearing officer instructed him to cross-examine Ortega, in order indubitably to dispose of the case with a "preponderance of evidence" as soon as possible.

(When a witness. -- the Chief Resident in Dr. O'Connor's graduating class who was Dr. Onne then and Dr. Sutton at the hearing in 1981, -- testified to how contractors meet their obligations over the years, she was asked why she sent Ortega, ten years before that 1981 hearing, what has now been decided as "illegally seized" self-made Valentine card, standard book of love poems, and her half-clad photograph as a model.

(Before the hearings even started, the hearing officer had told the early arrivals that "We have everything we need here, this should not take long."

(The hearings spread over five months and ended with another instruction for Ortega to submit his testimony in writing and not have it heard in a public hearing! He was not cross-examined again, which makes all that he submitted undisputed or unread. Yet he was dismissed and disqualified from state employment forever: "One strike and you're out!")

THE SECOND JURY TRIAL

This petition, in praying for a new trial, restricts its focus to the lawyers and judge. The second jury trial was a battle between witnesses and the jury was the judge. The behavior of the lawyers as they examine and cross-examine each witness was also observed. (Frequently, objections by defendant's counsel seemed to be followed, after a short but pregnant pause, by a well articulated but probably rehearsed response from his witnesses, including present petitioners.)

Nowhere in the petition is it mentioned how long the jury of eight, by agreement from both parties in dispute, deliberated after each phase ended. For the liability phase, the jury was out 6 hours. For the damage phase, the jury was out more than 6 hours. Throughout the trial they were alert and attentive, and by themselves conscientiously reviewed every piece of evidence and asked questions that came to them while doing it. Their verdict was arrived at from sum total of facts.

In this battle of witnesses, defendants' counsel withdrew a whole series that he had listed with offers of proof. Mr. Arnold -- (accountant student intern whom Mr. Friday appointed to look into contracts, but had not been a signatory to either of the two investigative reports when they were submitted "in camera" to Judge Vukasin) -- did not testify. Of alumni and still-to-graduate residents in 1981 that were listed by defendants, only Dr. Gandhi (who was Chief Resident in 1981) and petitioner O'Connor testified, but not Dr. Thomas Jackson, Dr. Robert Farmer, nor Dr. Elizabeth

Reynolds (whom counsel for defendants promised will be called).

Dr. Asha Gandhi's diary showed that, in the presence of Mr. Friday, on the Friday the secretaries told her Ortega had left to go "on vacation", Ortega's office door lock had been changed during the previous night. But there was obviously no need to do it at night, since each door key had a duplicate for the cleaning crew who worked at night. Mr. Friday did not deny being there early that Friday.

(The only reason for a locksmith to come is to open an old desk that Dr. Ortega locks every night for the last 17 years.

(Thusly did another undiscovered document became highly suspect. It stressed changing the lock to Ortega's office before he was asked to leave the premises and stay off the grounds!)

Dr. Elizabeth Reynolds worked with another alumna, Dr. Pranger (below) with the same group of residents since their graduation, and had also supervised Dr. Laskay, one of the investigators. She was the very first witness called during the State Personnel Board (hereafter S.P.B.) hearing in 1981.

When Ortega barely registered an objection against her "stale complaint", Mr. Rubin, then deputy attorney general, started to suspect that what she had to say might destroy their whole case without tainting Ortega's unblemished reputation.

[He had wanted a scandal to start the hearing -- (he succeeded later on, after failing to blackmail Ortega with Dr. Onne's photograph into not having Dr. Sutton testify!) -- by establishing an extended pattern of sexual harassment.]

He was right about why Ortega did not strenuously object: Dr. Reynolds was Ortega's co-leader in teaching family therapy to residents that year. Unsure by now, Rubin used all he had that another female resident (Chief Resident Onne, *nee* Sutton) sent to Ortega long ago to "open in secret", to show that she may be biased, when the Valentine card alone would have allowed the biased S. P. B. hearing officer to dismiss her testimony and tilt the weight of evidence against Ortega. (He said he agonized about Mrs. Ortega finding out through him!)

But a mistrial was sought when Dr. O'Connor's own record was used to cast doubt on his past professional honesty before the very same jury (which had no hidden agenda):

Dr. O'Connor had received a public letter of reprimand from the state medical licensing board after having illegally self-prescribed a restricted drug for a non-existent patient of his own age that he had invented!

And then, during closing argument, when plaintiff's counsel raises an objection, defendant's counsel would make faces to the jury. The judge was asked to remind him that he cannot silently comment that way, without it being recorded.

(By that time he had lost what little credibility he had left, since, unbeknownst to himself, he also addressed the jury with his arms clasped tightly across his chest, as if unable to be open and forthcoming with his audience. This was in stark contrast to plaintiff's counsel's demeanor.)

Only once did plaintiff's counsel rebut with some passion, when he pointed out that, in defendant's counsel's closing argument, he was still unwilling to see how defendants, now petitioners, exceeded their authority over an extended period.

(Should they be made accountable and separately become examples to be disavowed in the conduct of public office?)

It may well be this shared unwillingness by petitioners and their counsel to accept the exercise of excessive zeal by the state in searching and seizing, for self-serving reasons, that helped the jury to assess and award separate punitive damages.

(Good faith is always asserted and bad faith denied There was no self-defeating rebuttal offered to report of traffic court canceling all 60 parking tickets issued to Ortega by Friday's security officers for months before the search and seizure, when Ortega parked where he had always parked for 17 years, even on Sundays when he came on hospital grounds!)

REASONS FOR DISMISSING THIS PETITION

Petitioners' pleas for writ of mandamus and/or prohibition rest on grounds that (1) punitive damages would be chilling to unschooled administrators, that (2) they were deprived of a subjective "qualified immunity" defense, and that (3) their asserted (new and inventive) version of sexual harassment was not accepted as reasonable justification for search and seizure.

Each of their allegations to explain their defeat is discussed separately below as if not already lacking in inherent merit.

(1) THE "CHILL FACTOR" PREDICTED BY PETITIONERS IS ALREADY FELT BY "REAL PARTY IN INTEREST".

What is truly chilling is the effect this petition has on its target, the real party in interest who does not have the

unlimited resources of the state for legally harassing those who contest their abuse of authority under color of office.

All because of the hidden bias of the plurality against state employees "whose position members of the plurality do not look upon with much sympathy" (107 SCt 1506, continued below), all the while, ostensibly, making it easier for their employers not to consult state lawyers for case-by-case advice before undertaking intrusions into the private lives of workers:

The state paid up to $335,000 for trying to silence public criticisms by O'Connor's fellow alumnus from Dr. Ortega's post-graduate residency training program who worked as a staff psychiatrist and, also on O"Connor's watch, about $250,000 settled a case of negligent homicide by a prematurely discharged patient of a policeman whose survivors sued.

In contrast to petitioners, Ortega's record of 17 years was without a single grievance against him while he trained doctors -- (who then passed certification by the American Board of Psychiatry at higher rate than the national average) -- to staff understaffed state hospitals and prisons (some came to testify).

"The manner in which the plurality arrives at its standard, it seems to me, thus not only harms Dr. Ortega and other public employees, but also does a disservice to Fourth Amendment analysis." (Justice Blackmun, *O'Connor v. Ortega*, 107 SCt 1506).

"Where the warrant requirement might be 'unwieldy ' for public employers if it was required for every workplace search, the plurality has failed to explain why, on the facts of

this case, obtaining a warrant was burdensome for petitioners, evem if one assumes that they were unfamiliar with this requirement. In fact, the opposite seems true. Moreover, contrary to the plurality's suggestion, see *ante* at 1500, the warrant requirement is not limited to the criminal context." (Mr. Friday had search and seizure lessons. and search for forged documents has now been judicially noticed). At 1512.

"It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections (see *ante*, at 1507) inevitably surface . . . and shape, more than they ever should . . . any legal standard that is then articulated."

Justice Brennan, in *New Jersey v. T.L.O*, 469 US 325, 366-7 (1985) held that **"The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication."** (Thus, a single standard does not more efficiently serve justice for the individual nor does it increase the effectiveness of the collective.)

(2) PETITIONERS' COMPLAINT OF DENIAL OF SUBJECTIVE QUALIFIED IMMUNITY IS LODGED WITH THE WRONG COURT.

Pleas for extraordinary writ because the Ninth Circuit does not readily grant "qualified immunity" is premature. Petitioners did not pursue the issue of "qualified immunity" in petitioning for writ of certiorari in 1985.

They cannot now plead it and obtain special consideration even before the Ninth Circuit rules on whether they have been unlawfully deprived of such a defense.

"The qualified immunity issue was not raised below and was not addressed either by the District Court or the Court of Appeals." 107 SCt 1503. [Is it any court's duty to rescue preceding counsel who may be (as is now) accused of negligence (in not using both qualified immunity and sexual harassment in their prayers after losing in the court below)?]

"An extraordinary writ (under Sec. 1651 of Title 28 of U.S. Code) is a drastic remedy that must not be used to regulate the trial court's judgment in matters properly left to its sound discretion (of which more later), but that may be available to confine (of which even more later) the trial court to sphere of its discretionary power." . . .

"(It) **may** (emphasis added) be appropriate to prevent a trial court from making a discretionary decision where a statute (not case law) effectively removes the decision from the realm of discretion." In *re Estelle*, CA 5 (Tex.) 1975, 516 F2d 480, rehearing denied 521 F2d 814, certiorari denied 96 SCt 192.

Petitioners have prejudged their chances not least because their understanding of the cases they cited in their petition, to support a qualified immunity defense, is poor and/or deficient:

The Ninth Circuit *(sic)* decided in *Scott v. Henrich*, 39 F3d 912 (1994) that "Police were entitled to assert defense of qualified immunity from liability for civil damages arising from their use of deadly force without proving that they availed themselves of least intrusive means of responding to exigent situation; it was clearly not unreasonable for officers to take arms, knock on door of apartment, and identify themselves as police based on report of armed man inside

who recently fired shots and was acting crazy." Was Ortega crazy?

In *Sloan v. Herman*, 983 F2d 107 (8th Cir. 1993), "(Prison) (o)fficial's good faith or bad faith is irrelevant to qualified immunity inquiry; standard is one of **objective** reasonableness" (emphasis added).

This case law even emasculates preliminary requirement in *Harlow* (see above) that "Qualified or 'good faith' immunity is affirmative defense that must be pleaded by defendant official."

To defendants from police or prisons, FBI or Secret Service, as in *Hunter v. Bryant*, 502 US 224 (1991), "(q)ualified immunity standard gives ample room for mistaken judgments (on the spot, so to speak) by protecting all but the plainly incompetent or those who knowingly violate the law."

In *Anderson v. Creighton*, 107 SCt 3034 (1987), also established as law after warrantless search of Ortega's office in 1981 but cited in petition, the FBI were looking for a fugitive!

In more comparable *Sloan* (above) "Counsel's advice that court order to release inmate was not lawful did not immunize prison officials from liability for disobeying that order once order became final and nonappealable."

Petitioners for extraordinary writ allege that state counsel was consulted before separating state from private property. An investigator, Dr. Laskay, testified that after O'Connor forgot signing some letters, they searched for forged papers.

(Had they found any, Ortega would automatically lose all that the state had contributed to his retirement income to date!)

There was no testimony that legal counsel was consulted about whether what has now been **judicially noticed** as warrantless **search for forged documents** by Dr. Laskay was reasonable. Furthermore, Mr. Friday testified that, as head of security, he had had courses on "search and seizure"

From the Ninth Circuit again, in *Lucero v. Hart*, 915 F2d 1367 (1990) "County officials (who were granted qualified immunity) made reasonable efforts to accommodate clerk typist (who was) given numerous opportunities to re-take typing test (and) did not respond to attempts to provide her with alternative employment that did not involve typing."

Shields v. Burge, 874 F2d 1201 (7th Cir. 1989) held that: "It was not unreasonable . . . to think that search would turn up . . . evidence that would link the officer to alleged misconduct, . . . such as phone messages, calendar entries, memoranda or information concerning investigation of the target."

Petitioners allege no such aims to justify their intrusions, and no evidence whatsoever was produced that would support the reasonableness of the inception or scope of the search or seizure. They did not look for or find sexual paraphernalia.

Even federal employers like the Attorney General in 1986, when asked about searching and seizing of offices and papers of public employees to investigate diversion of federal funds to the Contras of Central America, was "not sure we would have any opportunity or any legal right to get into those

personal papers . . . I don't think public employees' private documents belong to the Government." (480 U.S. 737)

" . . . the seizure of a Valentine card, a photograph and a book of poetry . . . could have no conceivable relation to the claimed purpose of the search. . . this seizure is relevant to determining the reasonableness of the scope of the search. Accordingly, under the plurality's own standard, the search was unreasonable." Justice Blackmun in 1985, (107 SCt 1513).

(3) SEXUAL HARASSMENT COMPLAINT DID NOT START SEIZURE NOR JUSTIFY SCOPE OF SEIZURE AND *(sic)* / OR SEARCH.

Chief Resident's diary of the investigation shows that Ortega's office lock was changed in July 1981. This is also confirmed by defendant's counsel's own knowledge and admission in a pre-trial conference on March 26, 1996:

"Well, the lock was changed right from the get-go, at the end of July." (Cf. Appendix to this Petition, p. 78). Ortega's office as well as desk was allegedly searched afterwards.

In *Anderson* (above), the police already had "secure control" . . . i.e., the "greater intrusion" already had been consummated, -- (before there were complaints of sexual harassment), -- therefore there was no right to search.

Petitioners cite *Hopkins v. Andaya*, 858 F2d 881 (1992), again from the Ninth Circuit, which was complied with carefully by respondent against petitioners:

"Party moving for summary judgment has burden of proving absence of any genuine issue of material fact that would allow judgment as a matter of law."

A motion for summary judgment based on the directed verdict ending the first jury trial had been appropriately denied because of issues still in dispute, including whether sexual harassment was a justifiable excuse for search and seizure.

On this issue, moving party was fully heard as to the inception of the search but could not justify it or the scope of the seizure. Not all the witnesses listed with offers of proof, -- including Dr. Reynolds, who was said to have voluntarily complained of sexual harassment -- were called to testify.

Instead, Dr. Pranger, who was not even listed, was offered and listened to. What she remembers hearing, -- in weekly "no-holds-barred" group sessions with residents over the years, with the explicit expectation that nothing said will ever leave the meeting room, -- is short on specifics.

Dr. Pranger's hearsay testimony was incomplete at best because she wants to maintain confidentiality (which should have prevented her from even speaking in the first place). In fact, Dr. Pranger tried hard but was unclear as to dates and places and people she herself spoke to.

Dr. O'Connor heatedly argued outside of the second jury's hearing when reporting on his reaction to seized photograph that, as far as he was concerned, "undue influence" constituted sexual harassment of a subordinate, whether or not it was the subordinate that made the advances. And that it did not much matter that supervisor did not reciprocate. This brand new and inventive interpretation, unheard until spoken, is now offered

to support qualified immunity after the Supreme Court listed sexual harassment as an excuse for work-related searches. (But logical adherence to the O'Connor equation that inequality equals undue influence equals harassment makes this petition to a higher court quite harassing indeed!)

Judge Patel later appropriately directed a verdict in Ortega's favor on the single issue of sexual harassment as a reasonable excuse to start and extend the search and seizure. Both were inexcusable and unjustified.

First mention of court ruling about the ten-year-old Valentine card, standard book of love poems, and photograph was made when specific references to them moved plaintiff's lawyer to request the judge to instruct the jury about her ruling with regards to illegal search for and seizure of such personal papers. (Appendix accompanying petition contains many such issues that were subsequently resolved in favor of "party in real interest" by a jury of eight selected by both parties, after seized private correspondence were already ruled as having been illegally obtained.)

Petitioners allege that respondent judge did not follow the guidelines in *O'Connor v. Ortega* (above) rather than that she was unsound in judgment. Because respondent judge is an acknowledged authority on sexual harassment cases and has more expertise than petitioners or potential rescuers, an allegation of disobedience in the exercise of sound discretion is, on the face of it, frivolous but legally acceptsnlrle mugging.

Even if there was abuse of discretion, . . . petitioners have, in predicting a future chilling effect on kindred spirits, "failed to demonstrate . . . any hardship, let alone irreparable harm,

that had occurred or was likely to occur **immediately** (emphasis added), . . . there was therefore no reason to ignore . . . the clearly established mode of review for interlocutory orders of the type in question." . . . "Mandamus . . . may not be used to thwart the congressional policy of piecemeal appeals." In *re Estelle*, above.

The only case cited by petitioners in support of their plea for **immediate** intervention is clearly distinguishable from the present case: In *General Atomic Company v. Judge Felter*, 436 U.S. 493, "state court had **again** done precisely what federal Supreme Court had held there was no power of such state court to do."

DECLARATION

Under penalty of perjury, the undersigned declares that the statements in this brief are true of his own knowledge, understanding and belief (often in parenthesis). Little of above will be news to other "parties in interest".

CONCLUSION

For all of the foregoing reasons, observations, and legal decisions, this party in interest respectfully requests denial of this petition for extraordinary writ.

Directly submitted on May 20, 1996 in accord with Supreme Court Rule 27(b),

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